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The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions

Richard C.O. Rezie

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THE UKRAINIAN CONSTITUTION: INTERPRETATION OF THE CITIZENS' RIGHTS PROVISIONS

*Richard C.O. Rezie **

TABLE OF CONTENTS

INTRODUCTION AND GENERAL SCOPE	170
I. THE HISTORICAL BASIS OF THE CITIZENS' RIGHTS PROVISIONS AND THE CLAW BACK PROVISIONS	172
II. CONTEMPORARY POLITICAL AND IDEOLOGICAL BASIS OF THE CITIZENS' RIGHTS PROVISIONS AND THE CLAW BACK PROVISIONS.....	182
III. THE CONSTITUTIONAL COURT'S ROLE IN INTERPRETING THE CONSTITUTION.....	186
A. Procedural Issues Involved with Bringing a Case Before the Constitutional Court	186
B. Interpreting the Constitution: Methods Used by Other Courts and the Appropriate Method for Ukraine	189

* In 1996, Richard C.O. Rezie graduated *magna cum laude* from the State University of New York College at Oneonta with a B.A. in history. He is a J.D. candidate at Case Western Reserve School of Law ('99) where he is an Articles Editor for the *Case Western Reserve Journal of International Law*. The author wishes to thank the following persons who aided me greatly in preparing this article (in alphabetical order by last name): Judge Bohdan A. Futey, J.D., United States Court of Federal Claims, Edward Mearns, J.D., Professor Emeritus, Case Western Reserve University School of Law, Roman Szporluk, Ph.D., Director of The Harvard Ukrainian Research Institute, Myhailo S. Hrushevsk'yi Professor of Ukrainian History, Orest M. Ryzij, M.D., Ph.D. I would also like to thank the U.S.-Ukraine Foundation. All mistakes, misrepresentations, and misinterpretations, if any, fall squarely on my shoulders. This article is dedicated to John Ryzij, M.D., my grandfather, who served in the Ukrainian Armed forces during the struggle for Ukrainian independence and democratic ideals in WWI.

IV. CONCLUSIONS AS TO THE FUTURE INTERPRETATION OF THE CLAW BACK PROVISIONS AND RECOMMENDATIONS AS TO UKRAINE'S FUTURE COURSE OF ACTION	198
A. The Current Economic Situation in Ukraine and the Effect it may have on Constitutional Interpretation	198
B. Political Dangers to the Citizens' Rights Granting Provisions Including Foreign Intervention	202
C. Western Aid: Why it is Needed.....	206
D. The Appropriate Interpretive Method for Ukraine and its Future Use ...	207

INTRODUCTION AND GENERAL SCOPE

The fall of the Soviet Union allowed Ukraine to become independent for the first time since its short lived independence during World War I.¹ Within a few years of declaring its independence, Ukraine adopted a new Constitution on June 28, 1996.² Ukraine's new Constitution has provisions which purport to protect the rights of a Ukrainian citizen.³ These right-granting provisions, however, are almost uniformly subject to the adoption of future laws in the interest of the rights and freedoms of others, and also the authority of the state to protect public health, order, or welfare.⁴ One key example is the individual right to freedom of association in political parties and organizations.⁵ This right is limited by restrictions established by Ukrainian law in the interest of national security, public order, public health, and the rights and freedoms of others.⁶ These rights-limiting provisions which may be used to limit or remove previously granted rights under the laws of the Ukraine are often termed "claw back" provisions.⁷ In view of such "claw back" provisions, the main thrust of this Note is to explore, and possibly predict, the future effectiveness of the citizens'

¹ See OREST SUBTELNY, *UKRAINE: A HISTORY* 355-79 (1988) (discussing Ukraine's post-World War I attempt to secure and maintain independence).

² See UKRAYNSKA KONSTITUZIYA [Constitution] (1996) (Ukr.), *translated in* Verkhovna Rada Internet Site (visited Sept. 30, 1998) <<http://www.rada.kiev.ua/const/conengl.html>> [hereinafter UKRAYNSKA KONSTITUZIYA].

³ See *id.* at ch. II.

⁴ See *id.* at ch. II.

⁵ See *id.* at ch. II, art. 36.

⁶ See *id.* at ch. II, art. 37.

⁷ See Judge Bohdan A. Futey, *Comments on the Constitution of Ukraine*, E. EUR. CONST. REV., Spring-Summer 1996, at 29, 30.

rights provisions within the Ukrainian Constitution. In particular, this Note provides a guide for those who may argue for an expansive reading of the rights provisions and a consequent narrow reading of the claw back provisions before the Constitutional Court of Ukraine.

To arrive at an authoritative interpretation of the claw back provisions, one must determine what Ukrainian agency or court will interpret the Constitution and what such body may use to accomplish this task. Recent legislation in Ukraine gives the Constitutional Court of Ukraine (Constitutional Court) sole jurisdiction to interpret the Ukrainian Constitution (Constitution) and decide whether or not a law in is, indeed, constitutional.⁸ The Constitutional Court may interpret the Constitution using a number of factors. However, because the Constitution is internally inconsistent, the Constitutional Court cannot use the plain language of the Constitution.⁹ Instead, the Constitutional Court may use Ukraine's history to divine what was intended when the Constitution was written as well as what was intended to be avoided.¹⁰ Another possibility for interpreting the Constitution is using the political consensus which led to the Constitution's passage.¹¹ Additionally, conditions may also effect constitutional interpretation in a social or public opinion context so as to facilitate the public good economically or socially.¹² The Constitutional Court may use all of these factors as the U.S. Supreme Court does when interpreting the American Constitution or may use some or none of these factors, choosing instead the plain meaning of the Constitution.¹³

⁸ See Judge Bohdan A. Futey, *Comments on the Law on the Constitutional Court of Ukraine*, HARRIMAN REV., Spring 1997, at 15, 17.

⁹ Using the plain language is, in itself, an interpretive decision and is virtually impossible due to the Constitution's contradictory language. If the plain language, with no other factors, is used by the Constitutional Court, it would be intellectually dishonest and a betrayal of the true import of the Constitution. See generally Futey, *supra* note 7, at 29.

¹⁰ See generally *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (using American History to interpret the American Constitution).

¹¹ See *id.* (using the political consensus which led up to the adoption of the American Constitution to interpret the American Constitution).

¹² Compare *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution).

¹³ See *Martin*, 14 U.S. at 324-26. See generally *Lochner*, 198 U.S. 45 (discussing the fundamental right to contract); see also generally *West Coast Hotel Co.*, 300 U.S. 379 (balancing the interests between employer and employee).

In sum, this Note is meant to serve as a guide for those who wish to assure that the rights granted in the Ukrainian Constitution are not degraded. I hope to provide a basic framework that supports an expansive interpretation of the Constitution's citizens rights provisions before the Constitutional Court. In Part I, I will discuss the historical basis of both the citizens' rights provisions and the claw back provisions. Part I will also show why the citizens' rights provisions were included in the Constitution and what they were intended to prevent: in short, why history mandates a broad interpretation of citizens' rights while the claw back provisions allow only the most narrow encroachments on the rights granted. Part II will discuss the political history of the inclusion of the citizens' rights provisions and claw back provisions. The intent of those who drafted the Constitution and the political compromises they made to gain passage of the Constitution will also be discussed. Part III will describe the function of the Constitutional Court, its legislatively mandated procedures, and the appeals process. It will also describe the various interpretive frameworks which other national and supra-national courts have developed to interpret similar provisions. In concluding, Part IV will first discuss the economic threats to Ukrainian sovereignty and democratization in Ukraine. Political threats to an unbiased interpretation of the Constitution, both external and internal, will also be evaluated. I will conclude by advocating the interpretive method which the Constitutional Court should embrace and discussing whether Ukraine will proceed on the road to democracy or backtrack down the path to authoritarianism.

I. THE HISTORICAL BASIS OF THE CITIZENS' RIGHTS PROVISIONS AND THE CLAW BACK PROVISIONS¹⁴

A court which interprets constitutional provisions may use the nation's history and how this led up to the adoption of certain constitutional provisions to determine what those constitutional provisions were intended to allow or limit when adopted.¹⁵ Commentators of Ukraine law and history have advocated that the Constitutional Court should use Ukraine's history to aid in its interpretation of the Constitution due to the effect of history on the citizens' Constitutional rights

¹⁴ See generally, Jurij Borys, *Political Parties in the Ukraine*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 128 (Taras Hunczak ed., 1977).

¹⁵ See, e.g., *Martin*, 14 U.S. at 324-26; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

provisions and the apparent intent of the Constitution to prevent future governmental excesses such as occurred under Soviet Rule.¹⁶

In the 20th century, Ukraine's history reveals an intent to follow "Western" values and ideology.¹⁷ Prior to the 1990s, Ukraine was independent only during one other period this century, namely in the closing days of World War I.¹⁸ The path that the Ukraine chose at that

¹⁶ See generally Futey, *supra* note 7, at 29; ALEXANDER J. MOTYL, *DILEMMAS OF INDEPENDENCE: UKRAINE AFTER TOTALITARIANISM* (1993) (examining Ukraine's troublesome Soviet past and suggesting ways in which it can be overcome); SUBTELNY, *supra* note 1.

¹⁷ See Roman Szporluk, *Ukraine: From an Imperial Periphery to a Sovereign State*, 126 *DAEDALUS* 85, 85-86 (1997) (arguing that Ukrainians identify themselves as rejecting Polish and Russian national identities); IVAN L. RUDNYTSKY, *Ukraine Between East and West*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 1, 8 (Peter L. Rudnytsky ed., 1987); IVAN L. RUDNYTSKY, *The Fourth Universal and Its Ideological Antecedents*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 186, 187, 197, 205 (Taras Hunczak ed., 1977) (discussing Ukraine's 1918 declaration of independence). See generally *The First Universal of the Ukrainian Central Rada* (1917) (Ukr.), reprinted in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 382 (Taras Hunczak ed., 1977) (asserting that the Ukrainian Assembly has the right to promulgate laws leading to order); *The Second Universal of the Ukrainian Central Rada* (1917) (Ukr.), reprinted in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 385, 385-86 (Taras Hunczak ed., 1977).

Western ideals and values referred to throughout this document refer to the general principles of human rights, limited government, and a civil society which embraces rule of law which are generally acknowledged in Western Europe and North America. See Martha Bohachevsky-Chomiak, *The Directory of the Ukrainian National Republic*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 82, 94-95 (Taras Hunczak ed., 1977).

¹⁸ See SUBTELNY, *supra* note 1, at 355-79; John S. Reshetar, *The Communist Party of the Ukraine and Its Role in the Ukrainian Revolution*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 159, 159, 162, 180 (Taras Hunczak ed., 1977) (stating that the Ukrainian Communist Party originally had little ethnic Ukrainian content and that Ukraine was oppressed by Russia which had little interest in Ukrainian independence); Jaroslaw Pelenski, *The Origins of the Official Muscovite Claims to the "Kievan Inheritance,"* 1 *HARV. UKRAINIAN STUD.* 29 (1977) (stating that Russia claims that Ukraine is part of Russia). See generally Alexander J. Motyl, *The Foreign Relations of the Ukrainian SSR*, *HARV. UKRAINIAN STUD.*, March 1982, at 62, 63 (1982) (arguing that Ukraine was not truly independent during Soviet rule); IVAN L. RUDNYTSKY, *The Role of Ukraine in Modern History*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 11 (Peter L. Rudnytsky ed., 1987); IVAN L. RUDNYTSKY, *Observations on the Problem of "Historical" and "Non-historical" Nations*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 37 (Peter L. Rudnytsky ed., 1987) (discussing the relationship among political independence, the existence of a politically conscious representative upper class, and the completeness or incompleteness of nations).

point in history was clearly pro-Western and opposite to the anti-Western path that Russia and the Union of Soviet Socialist Republics (USSR) chose.¹⁹ Although the evolution of a rule of law and democracy in Ukraine were halted by the defeat of the Ukrainian National Republic after World War I, this evolution was reborn in the Soviet thaw of 1960-1980.²⁰

Ukraine's history also reveals a long standing tradition of protection of human rights and limitations on government power.²¹ As early as 1710, the Ukrainian Constitution of Pylyp Orlyk (Orlyk Constitu-

¹⁹ See Ihor Kamenetsky, *Hrushevskyyi and the Central Rada*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 33, 57 (Taras Hunczak ed., 1977) (arguing that in 1917 the Rada adhered to democratic principles); Taras Hunzak, *The Ukraine Under Hetman Pavlo Skoropadsky*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 61, 69 (Taras Hunczak ed., 1977) (stating that Hetman Skoropadsky proclaimed freedom of speech and assembly in 1918); Yaroslav Bilinsky, *The Communist Take-Over of the Ukraine*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 104, 111 (Taras Hunczak ed., 1977) (stating that the Communist forces promised democracy); Wolodymyr Stojko, *Ukrainian Aspirations and the Russian Provisional Government*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 4, 6 (Taras Hunczak ed. 1977); IVAN L. RUDNYTSKY, *Trends in Ukrainian Political Thought*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 91 (Peter L. Rudnytsky ed., 1987) [hereinafter RUDNYTSKY, *Trends*]; IVAN L. RUDNYTSKY, *The Political Thought of Soviet Ukrainian Dissidents*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 477, 479-82 (Peter L. Rudnytsky ed., 1987) (discussing Ukraine's rejection of "national" communism and integral nationalism). Compare UHODA TA KONSTITUZIYA PYLYPA ORLYKA [Constitution] art. 6, 7, (1710) (Ukr.) with KONSTITUZIYA UKRAYNSKOYIE RADYNSKOYIE SOSIALISTICHNOIE RESPUBLIKE (as amended through Nov. 21, 1949) [Constitution] art. 105 (Ukr.), translated in AMERICAN RUSSIAN INSTITUTE, *CONSTITUTION OF THE UKRAINIAN SOVIET SOCIALIST REPUBLIC* (1950).

²⁰ See W. Yevdokymov, *Development of the Idea of a Law Responsive State During Totalitarian Regime and the Transition of Society to Democracy*, PRAVO UKRAINY: IURYDYCHNYI ZHURNAL, July 1997, at 3, 3.

²¹ See UHODA TA KONSTITUZIYA PYLYPA ORLYKA art. 6, 7, (1710) (Ukr.); see generally 2 UKRAINE: A CONCISE ENCYCLOPAEDIA 1-119 (Volodymyr Kubijovyč ed., 1971) (describing Ukrainian legal history). See generally Arthur E. Adams, *The Great Ukrainian Jacquerie*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 247, 260, 262 (Taras Hunczak ed., 1977); Frank Sysyn, *Nester Makhno and the Ukrainian Revolution*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 271, 280 (Taras Hunczak ed., 1977); Oleh S. Fedyshyn, *The Germans and the Union for the Liberation of the Ukraine, 1914-1917* in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 305, 322 (Taras Hunczak ed., 1977); Bohdan R. Bociurkiw, *The Church and the Ukrainian Revolution: The Central Rada Period*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 220, 239 (Taras Hunczak ed., 1977) (discussing calls made by Ukrainian church groups to the people urging them to resist Soviet invasion).

tion) included provisions granting rights to citizens and provisions which limited the authority of the government.²² The *Hetman*,²³ for instance, could not use his position for personal revenge or violate the Orlyk Constitution when it seemed expedient for him to do so.²⁴ Rather, the Ukrainian government was as bound by the provisions of the Orlyk Constitution as were the citizens.²⁵ More recently, Drahomanov's (1884) draft Constitution provided extensive protection for speech, and the press, and additionally prevented illegal searches allowing limitations on these rights only in time of war.²⁶ The contrast is stark between these early principles and the Ukrainian Constitution under the USSR where, due to political and military reality, the government was not bound by any provisions which granted rights and liberties to citizens due to political and military reality.²⁷

The current 1997 Ukrainian Constitution seemingly attempts to prevent Soviet-style governmental control and abuse of the rights of citizens enumerated in the Constitution.²⁸ One such abuse in the Soviet system was rule by the Central Committee of the Communist Party rather than the elected Supreme Soviet.²⁹ In the Soviet system, the government was controlled by the Communist Party structure which mirrored the elected government structure.³⁰ Article 37 of the current 1997 Constitution specifically prohibits political party struc-

²² See UHODA TA KONSTITUZIYA PYLYPA ORLYKA art. 6, 7 (1710) (Ukr.).

²³ Equivalent of an elected Prime Minister or President. See generally SUBTELNY, *supra* note 1, at 110.

²⁴ See UHODA TA KONSTITUZIYA PYLYPA ORLYKA art. 6, 7 (1710) (Ukr.).

²⁵ See *id.*

²⁶ See Mykhailo Drahomanov, *Draft Constitution for the Ukrainian Society in the Free Union*, in TOWARDS AN INTELLECTUAL HISTORY OF UKRAINE: AN ANTHOLOGY OF UKRAINIAN THOUGHT FROM 1710 TO 1995, at 171, 172-73 (Ralph Lindheim & George S.N. Luckyj eds., 1996) (stating that citizens had the right to resist illegal government acts).

²⁷ See generally Futey, *supra* note 7, at 29.

²⁸ See generally *id.*

²⁹ See SUBTELNY, *supra* note 1, at 386, 510-12; MOTYL, *supra* note 18, at 67 (stating that the Ukrainian Communist Party was an instrumentality of the Russian Communist Party in 1917).

³⁰ See BORIS A. TSEPOV, *Protection and Promotion of Human Rights: Power Allocation Among Central, Regional, and Local Governments in the Russian Federation*, in GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R. 410, 411 (James E. Hickey, Jr. & Alexej Ugrinsky eds., 1996).

ture from mirroring the structure of the government.³¹ The apparent intent of this article is to prohibit any political party from forming its own government inside the elected government of Ukraine. Thus, its operation prohibits a Soviet-style government within Ukraine.

In the 1930s, Ukraine was subjected to illegal acts of the government of the USSR, most notably at Vinnytsia and during the engineered terror-famine of 1932-1933.³² Vinnytsia, a city in central Ukraine, was one of the cities where the NKVD conducted mass executions and burials.³³ The corpses interred at Vinnytsia were exhumed by German forces during World War II and autopsies were performed

³¹ See UKRAYNSKA KONSTITUZIYA ch. II, art. 37 (1996) (Ukr.); Cf. Anatoly Tkachuk, *Cabinet Ministers' Analysis of the Current Situation in Ukraine After the 1994 Presidential and Parliamentary Elections*, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1 (discussing the hybrid nature of the pre-constitutional and post-Soviet Ukrainian government).

³² See *German Government Report on Vinnytsia 1944*, in THE TRAGEDY OF VINNYTSIA MATERIALS ON STALIN'S POLICY OF EXTERMINATION IN UKRAINE DURING THE GREAT PURGE, 1936-1938 91, 168-210 (Ihor Kamenetsky ed., 1989) (describing those killed by the NKVD in Vinnytsia); Petro Dolyna, *Famine as a Political Weapon*, in THE BLACK DEEDS OF THE KREMLIN: A WHITE BOOK 5, 120 (S. O. Pidhainy et al. eds., 1955) (describing deaths from the engineered famine in Ukraine 1932-1933 at five to six million). See generally Ivan Dudynets, *The Great Famine in Ukraine in 1932-1933*, in THE BLACK DEEDS OF THE KREMLIN: A WHITE BOOK 141, 141 (S. O. Pidhainy et al. eds., 1955) (describing the famine and how it was conducted); KONSTITUZIYA SOYUZU RADYNSKOYIE SOSIALISTICHNOIE RESPUBLIKE [Constitution] (1936) (U.S.S.R.), translated in ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 77 (1981); Danylo Chaykovsky, *Stepan Bandera, His Life and Struggle*, in MURDERED BY MOSCOW 36 (1962) (discussing Bandera's rise as a leader of the Organization of Ukrainian Nationalists and Moscow's fifteen-year mission to assassinate him); Dmytro Shtykalo, *The Founder of the Revolutionary Liberation Movement*, in MURDERED BY MOSCOW 29 (1962) (discussing Evhen Konovalts' role in the foundation of the Ukrainian Military Organization and the Organization of Ukrainian Nationalists and his murder at the hands of a Soviet agent); Stepan Lenkavsky, *Soviet Russian Political Murders Abroad and Attempts to Camouflage Them*, in MURDERED BY MOSCOW 5 (1962). Cf. ANDREW WILSON, UKRAINIAN NATIONALISM IN THE 1990S: A MINORITY FAITH 147-52 (1997) (discussing the theme of national suffering in Ukrainian nationalism).

³³ See generally THE TRAGEDY OF VINNYTSIA MATERIALS ON STALIN'S POLICY OF EXTERMINATION IN UKRAINE DURING THE GREAT PURGE, 1936-1938, 210 (Ihor Kamenetsky ed., 1989).

The NKVD is the descendant, administratively, of the Cheka and the forerunner of the KGB. See CHRISTOPHER ANDREW & OLEG GORDIEVSKY, KGB: THE INSIDE STORY, ix (1990). All these agencies are organs of state security of the former USSR. See *id*; SUBTELNY, *supra* note 1, at 365, 374, 420, 461, 479, 488-90.

by international human rights groups.³⁴ Many of the corpses were found with court documents on their persons sentencing them to terms of years in prison rather than death.³⁵ This evidences the lack of rule of law in the USSR as court decisions were ignored by governmental agencies, most notoriously the NKVD.³⁶

The implementation of the terror-famine in Ukraine, 1932-1933 further evidences the absence of a rule of law.³⁷ The terror-famine was an engineered famine in which five to nine million persons were starved to death in an attempt to force collectivization upon Ukrainian farmers.³⁸ Such acts by the government were prohibited by the citizens' rights provisions in the Constitutions of both the Ukrainian SSR and the USSR of the time.³⁹ As with Vinnytsia and other crimes of the USSR's government, these provisions were simply ignored.⁴⁰

³⁴ See generally *German Government Report on Vinnytsia 1944* in THE TRAGEDY OF VINNYTSIA MATERIALS ON STALIN'S POLICY OF EXTERMINATION IN UKRAINE DURING THE GREAT PURGE, 1936-1938, *supra* note 32, at 168-210.

³⁵ See *id.* at 168-210 (describing the items found with the NKVD's victims).

³⁶ See Anna M. Kvmik, *Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law*, 34 HARV. INT'L L. J. 611, 611 (1993) (discussing Soviet legal theory and how laws were not followed or enforced due to political expediency).

³⁷ See Dolyna, *supra* note 32, at 120 (describing deaths from the engineered famine in Ukraine 1932-1933 at five to six million). Cf. ROBERT CONQUEST, THE HARVEST OF SORROW: SOVIET COLLECTIVIZATION AND THE TERROR - FAMINE 301, 303, 306 (1986) (estimating 14.5 million dead in the famine and dekulakization, seven to nine million in the famine alone). See generally Dudynets, *supra* note 32, at 141, 141-710 (describing the famine and how it was conducted). See also generally Kazuo Nakai, *Soviet Agricultural Policies in the Ukraine and the 1921-1922 Famine*, HARV. UKRAINIAN STUD., March 1982, at 43, 45 (1982) (arguing that the famine of 1921-1922 was caused by Soviet collectivization).

³⁸ See Dolyna, *supra* note 32, at 120 (describing deaths from the engineered famine in Ukraine 1932-1933 at five to six million).

³⁹ See KONSTITUZIYA UKRAYNSKOYIE RADYNSKOYIE SOSIALISTICHNOIE RESPUBLIKE art. 105 (as amended through Nov. 21, 1949) (Ukr.), translated in AMERICAN RUSSIAN INSTITUTE, CONSTITUTION OF THE UKRAINIAN SOVIET SOCIALIST REPUBLIC (1950); KONSTITUZIYA SOYUZU RADYNSKOYIE SOSIALISTICHNOIE RESPUBLIKE [Constitution] ch. II (1924) (U.S.S.R.), translated in ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 58, 59-60 (1981); KONSTITUZIYA SOYUZU RADYNSKOYIE SOSIALISTICHNOIE RESPUBLIKE ch. X art. 125 (1936) (U.S.S.R.), translated in ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS 77, 156 (1981). But see ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS 282, 283 (1981) (stating that the Bill of Rights in the 1977 USSR Constitution was more

Russia has a historical lack of respect for courts and their judicial decisions.⁴¹ Although a full discussion of such conduct is beyond the scope of this Note, the incidents which are previously recounted here clearly support the lack of the rule of law in the USSR.⁴² Soviet law operated according to political expediency.⁴³ In contrast, the 1997 Ukrainian Constitution prohibits such acts against the rule of law by the government in Article 60 and establishes rule of law in Ukraine.⁴⁴ Article 60, once again, shows the effect of history on Ukraine's current Constitution and the intent of the framers to limit the power of the sovereign (government of Ukraine).⁴⁵

Political reprisals and mass murder which were common in the USSR are prohibited by the current Constitution in Articles 27-29.⁴⁶ The prohibition on such acts of the government evidences an intent to stop any carry-over of the USSR's historical practices to the contemporary government of Ukraine.⁴⁷

A portion of the political ideology of the USSR, namely socialism (rather than international communism), remains ingrained in

limited than most other communist constitutions and that the Stalin Constitution enumerated even fewer rights). *See generally* KONSTITUZIYA SOYUZU RADYNSKOYE SOKIALISTICHNOYE RESPUBLIKE [Constitution] ch. VIII (1977) (U.S.S.R.), *translated in* ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR 230, 246 (1981) (outlining the national-state structure of the U.S.S.R.).

⁴⁰ *See* MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW 21-22 (1979) (stating that early Soviet Constitutions plainly rejected judicial review opting for political control of constitutional interpretation; it was not until 1977 that Soviet Constitutions were amended to recognize constitutional supremacy); TSEPOV, *supra* note 30, at 411 (arguing that the Soviet system ignored the very notion of human rights and the rights enumerated in the USSR Constitutions and the Republics' Constitutions were never implemented).

⁴¹ *See* ROBERT B. AHDIEH, RUSSIA'S CONSTITUTIONAL REVOLUTION: LEGAL CONSCIOUSNESS AND THE TRANSITION TO DEMOCRACY 1985-1996, at 149 (1997) (stating that President Yeltsin disbanded the Russian Constitutional Court for 18 months after September 21, 1993).

⁴² *See* Kvzmik, *supra* note 36, at 611 (stating that socialist law differs from rule of law in that it is not to limit government but rather to facilitate political ends).

⁴³ *See id.* at 611.

⁴⁴ *See* UKRAYNSKA KONSTITUZIYA ch. II, art. 60 (1996) (Ukr.).

⁴⁵ Such intent to limit sovereign immunity is also demonstrated by the Constitutional provisions which allow citizens of Ukraine to recover monetary damages from the government when their rights are violated. *See id.* art. 56.

⁴⁶ *See id.* art. 27-29.

⁴⁷ *See* Futey, *supra* note 7, at 29.

Ukraine and embodied in the Constitution.⁴⁸ Social welfare rights in the Constitution include: (1) the right to work; (2) the right to rest; (3) the right to be provided for when disabled; (4) the right to housing; (5) the right to an acceptable standard of living; (6) the right to protection of health and; (7) the right to education.⁴⁹ These are termed positive rights as they require the government to do something, rather than prohibiting its action, which would consequently be termed negative rights.⁵⁰ These rights demonstrate the socialist past of Ukraine under the USSR and socialism's current public appeal in Ukraine, once again demonstrating the effect of history on Ukraine's Constitution.⁵¹

Environmental disasters during the Soviet period, such as Chernobyl,⁵² also have a current effect on Ukraine's Constitution. Environmental protection is held to be a right in Article 50.⁵³ Chernobyl was a watershed event in Ukraine's political development in that many Ukrainians began questioning Soviet rule after the catastrophe and whether the central government of the USSR actually cared about the plight of its citizens—specifically Ukrainians.⁵⁴ Environmental protection provisions in the Constitution evidence not only a limiting intent on the government and on other citizens' activities but also a mistrust of the government.⁵⁵

Historically, Ukraine has been a pro-Western nation which has favored citizens' rights and limitations on governmental powers.⁵⁶ Ukraine's national identity is partially defined by opposition to Russia

⁴⁸ See *id.* Ukraine's population was decimated by mass murders of the intelligentsia and the flight of the elites who were so endangered. See ZINOVIA SLUZHYNKA, HUMAN RACE IN UKRAINE 100-02 (1995). Some have argued that the current population of Ukraine has been reduced to, largely, those who need and support such protection. See *id.* It is also argued that those who support capitalism and democratization are mostly dead or in foreign lands leaving Ukraine without a democratic intelligentsia to lead it into the future. See *id.*

⁴⁹ See UKRAYNSKA KONSTITUZIYA ch. II, arts. 43, 45-49, 53 (1996) (Ukr.).

⁵⁰ See Futey, *supra* note 7, at 30.

⁵¹ See M. Melnyk, *Commentary on the New Constitution of Ukraine*, SVOBODA, Aug. 27, 1996, at 2.

⁵² See, e.g., ROMAN SOLCHANYK, UKRAINE: FROM CHERNOBYL' TO SOVEREIGNTY: A COLLECTION OF INTERVIEWS xiii (1992).

⁵³ See UKRAYNSKA KONSTITUZIYA ch. II, art. 50 (1996) (Ukr.).

⁵⁴ See *id.* art. 43, 45-49, 53; SOLCHANYK, *supra* note 52.

⁵⁵ See SOLCHANYK, *supra* note 52, at xiii.

⁵⁶ See UHODA TA KONSTITUZIYA PYLYPA ORLYKA art. 6, 7 (1710) (Ukr.); LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 191-274 (1992).

and is, as such, pro-Western.⁵⁷ In fact, Ukraine became anti-Russian when Russia broke with its Westernization program during the Czarist era, previous to which Ukrainians had been among the leading proponents of Russian Westernization.⁵⁸ Russian national identity after the Russian revolution is best summarized by Liah Greenfield:

'They fear not laws; right gives way to force, and justice lies conquered beneath the aggressive sword.' The Scythians were the negation of civilization, of all Rome stood for, the embodiment of the forces of darkness . . . Only in utter exasperation [about Russia's lack of national identity] could [the Russian intelligentsia of 1917] claim the name of this savage tribe.⁵⁹

Ukraine, therefore, has a national identity which supports Western thought, civil liberties, and limits on governmental authority.⁶⁰

Ukraine's pro-Western national identity is further indicated by the similarity between many citizens' rights provisions in its Constitution and the provisions in the U.S. Constitution which limit governmental power and provide rights for citizens.⁶¹ The negative rights provisions in Ukraine's Constitution which are based on its pro-Western national identity, history, and historical animosity toward Russia⁶² include: (1) the rights which are enumerated are not an ex-

⁵⁷ See GREENFELD, *supra* note 56, at 191-274; Yevdokymov, *supra* note 20, at 3, 4 (stating that rule of law and human rights are growing in popularity in Ukraine).

⁵⁸ See GREENFELD, *supra* note 56, at 191-274.

⁵⁹ *Id.* at 273.

⁶⁰ See generally Tkachuk, *supra* note 31 (describing the distribution of power in post-independence, pre-Constitution Ukraine).

⁶¹ Compare UKRAYNSKA KONSTITUZIYA ch. II (1996) (Ukr.) with U.S. CONST. amend. I-X. The superficial similarity in these provisions begins with the granting of similar rights and ends at the point where the claw back provisions occur.

⁶² See JURIJ BORYS, *THE RUSSIAN COMMUNIST PARTY AND THE SOVIETIZATION OF UKRAINE* 298, 321, 331 (1960). See generally IVAN L. RUDNYTSKY, *Soviet Ukraine in Historical Perspective*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 463, 464-500 (Peter L. Rudnytsky ed., 1987); IVAN L. RUDNYTSKY, *The Intellectual Origins of Modern Ukraine*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 123 (Peter L. Rudnytsky ed., 1987) (discussing the influences on Ukrainian intellectual development prior to World War I); IVAN L. RUDNYTSKY, *The First Ukrainian Political Program: Mykhailo Drahomanov's "Introduction" to Hromada*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 225 (Peter L. Rudnytsky ed., 1987) (critiquing Drahomanov's theory of an all-Ukrainian democratic communalism); IVAN L. RUDNYTSKY, *The Ukrainian National Movement on the Eve of the First World War*, in *ESSAYS IN MODERN UKRAINIAN HISTORY* 375, 386-87 (Peter L. Rudnytsky ed., 1987) (discussing the Russification of Ukraine and the countervailing nationalist consciousness of Ukrainians); George A. Brinkley, Jr., *Allied Policy and French Intervention in the*

haustive list of citizens' rights; (2) citizens have the right to equal protection under the law; (3) the inviolability of one's home; (4) the right to privacy in one's mail and correspondence; (5) the right to freedom in one's personal life; (6) the right to freedom of movement within Ukraine and to leave Ukraine; (7) the right to freedom of speech; (8) the right to freedom of religion; (9) the right to freedom of association; (10) the right to vote; (11) the right to assemble peacefully; (12) the right to engage in entrepreneurship, own property, and protect one's intellectual property; (13) the right to strike; (14) the prohibition on enacting retroactive laws.⁶³ The similarity between provisions in Ukraine's Constitution and those in the U.S. Constitution as interpreted by the U.S. Supreme Court demonstrate an intent to regain Ukraine's Western national identity and historically Western ideology, as well as to set Ukraine apart from Russia in terms of national identity and history, especially during the Soviet period.⁶⁴ Moreover, the Constitution seeks to create a civil society which was thought to be "capitalist subterfuge" during the Soviet period.⁶⁵ Indeed, civil society did not even exist in the pre-1989 USSR.⁶⁶

Ukraine, 1917-1920, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 323 (Taras Hunczak ed., 1977) (exploring the complex political and social context encountered by the Allies in their attempt to intervene in Russia during World War I); Constantine Warvariv, *America and the Ukrainian National Cause, 1917-1920*, in *THE UKRAINE, 1917-1921: A STUDY IN REVOLUTION* 352, 378 (Taras Hunczak ed., 1977) (referring to the U.S. State Department's view that popular demand for greater Ukrainian local autonomy existed there in 1919).

⁶³ See UKRAYNSKA KONSTITUZIYA ch. II, arts. 21, 22, 24, 30-36, 38, 39, 41, 42, 44, 58 (1996) (Ukr.).

⁶⁴ See Futey, *supra* note 7, at 29; *Ukraine Sets Course for the West*, CURRENT DIGEST OF THE POST-SOVIET PRESS, May 22, 1996, at 26 (condensing and translating Vladimir Skachko's original article appearing in SEVODNYA, Apr. 24, 1996, at 8); Evhen I. Golovakha & Nataliya V. Panina, *The Development of a Democratic Political Identity in Contemporary Ukrainian Political Culture*, in NATIONALISM, ETHNICITY AND IDENTITY 403, 403 (Russell F. Farnen ed., 1994).

⁶⁵ See Yevdokymov, *supra* note 20, at 3.

⁶⁶ See MOTYL, *supra* note 16, at 60.

II. CONTEMPORARY POLITICAL AND IDEOLOGICAL BASIS OF THE CITIZENS' RIGHTS PROVISIONS AND THE CLAW BACK PROVISIONS⁶⁷

The framers' intent is appropriately used by courts to interpret a constitution.⁶⁸ Ukraine, prior to the 1997 Constitution's adoption, experienced a proliferation of parties, perhaps in response to the end of Soviet one-party rule, including the Socialist party, the Peasant's party, the Green party, the Nationalist parties, and the Christian Democrats.⁶⁹

The number of parties in post-independence Ukraine includes over thirty-eight registered parties in 1996.⁷⁰ Although the Worker's Party and the National Democratic movements were key factors in Ukraine's transformation up until independence,⁷¹ four main groups of parties are most influential today.⁷² These groups are the Communists (which is the largest) and the Socialists (including the Peasant Party and the Agrarian Parliamentary Faction), who compose the leftist parties, the Ukrainian National Assembly and Congress of Ukrainian Nationalists, who can be described as rightists, and the center-right Na-

⁶⁷ The author considers it important, when considering Ukraine's contemporary political environment, that Russia has recognized Ukraine, alleviating some of Ukraine's fear of invasion and external interference. See Roman Szporluk, *The National Question*, in AFTER THE SOVIET UNION: FROM EMPIRE TO NATIONS 84, 95 (Timothy J. Colton & Robert Legvold eds., 1992) (stating that President Yeltsin recognized Ukrainian independence as early as November 1990).

⁶⁸ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-29 (1816) (stating what the framers of the U.S. Constitution intended and basing the U.S. Supreme Court's interpretation of the applicable U.S. Constitutional provisions on the framer's intent).

⁶⁹ See Anatolii Rusnachenko, *The Workers' and National-Democratic Movements in Contemporary Ukraine*, J. UKRAINIAN STUD., Summer-Winter 1993, at 123, 123. See Golovakha & Panina, *supra* note 64, at 411. See generally O.L. Barabash, *Legislative Process in Ukraine* 1994, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 2-3 (describing the Rada's legislative initiative in pre-Constitution Ukraine); Aleksandr Koretsky & Viktor Zamyatin, *There is Now One Fewer 'Land of Soviets'*, KOMMERSANT-DAILY, June 9, 1996, at 1, condensed in CURRENT DIGEST OF THE POST-SOVIET PRESS, July 5, 1995, at 24 (describing the post-independence, pre-Constitution government of Ukraine).

⁷⁰ See Taras Kuzio, *The Emergence of Ukraine: Part One*, 268 CONTEMP. REV. 119, 123 (1996); *Country Report: Ukraine*, ECONOMIST INTELLIGENCE UNIT COUNTRY REP., 1st Quarter 1997, at 13 [hereinafter *Ukraine*, 1st Quarter].

⁷¹ See generally Rusnachenko, *supra* note 69.

⁷² See Kuzio, *supra* note 70, at 123-25.

tional Democrats.⁷³ The Rukh party – which was powerful during Ukraine's independence movement – has a diminished role today.⁷⁴

Although political parties have proliferated, apathy and mistrust of parties and the government is common among Ukrainians.⁷⁵ Rukh's platform of bringing Ukraine into line with the U.N. Universal Declaration of Human Rights⁷⁶ is popular with Ukrainians – who continue to favor Western political ideas⁷⁷. The main impediments to the citizenry forcing democratization and libertarian reforms upon the government were, and continue to be, the lack of confidence in both the president and parliament⁷⁸ coupled with the fragmentation of political parties.⁷⁹

Ukrainians embraced independence by a vote of over ninety percent⁸⁰ and yet many never read the published drafts of the 1997 Constitution.⁸¹ This created a political disagreement between Moroz Oleksandr, the leader of the Socialist Party, and President Leonid Kuchma over how the Constitution should be ratified.⁸² President Kuchma favored popular ratification while Moroz favored parliamentary ratification, arguing that the people would ratify anything.⁸³ The dispute came to a head when President Kuchma signed a decree fixing September 25, 1997 as the date for a national referendum on the Con-

⁷³ See *id.*

⁷⁴ See *Program of the Popular Movement for the Restructuring of Ukraine*, in *TOWARDS AN INTELLECTUAL HISTORY OF UKRAINE: AN ANTHOLOGY OF UKRAINIAN THOUGHT FROM 1710 TO 1995*, at 341, 341 (Ralph Lindheim & George S.N. Luckyj eds., 1996).

⁷⁵ See Golovakha & Panina, *supra* note 64, at 403, 405, 409, 414.

⁷⁶ See *Program of the Popular Movement for the Restructuring of Ukraine*, *supra* note 74, at 346-48.

⁷⁷ See Golovakha & Panina, *supra* note 64, at 403, 424.

⁷⁸ See Viktor Zamyatin, *Authorities Will Argue Until the People Intervene*, *KOMMERSANT-DAILY*, May 18, 1996, at 4, condensed in *CURRENT DIGEST OF THE POST-SOVIET PRESS*, June 12, 1996, at 21.

⁷⁹ See *Country Report: Ukraine*, *ECONOMIST INTELLIGENCE UNIT COUNTRY REP.*, 4th Quarter 1996, at 11-12 [hereinafter *Ukraine*, 4th Quarter].

⁸⁰ See TARAS KUZIO & ANDREW WILSON, *UKRAINE: PERESTROIKA TO INDEPENDENCE* 1 (1994).

⁸¹ See Zamyatin, *supra* note 78, at 21.

⁸² See *Ukraine*, *E. EUR. CONST. REV.*, Winter 1996, at 29, 30.

⁸³ See *id.*

stitution.⁸⁴ Despite the decree, the Verkhovna Rada (Rada),⁸⁵ the Ukrainian Parliament, adopted the Constitution two days after Kuchma signed the decree calling for a national referendum.⁸⁶ The Constitution was passed in the Rada with virtually no support from the Communists.⁸⁷ In fact, the Communists unsuccessfully attempted to block the Constitution's passage entirely.⁸⁸

The debates which led up to the Constitution's adoption included all parties in some way, but the most important Constitutional drafts were submitted by the Communist faction of the Rada, the Nationalists, and the Christian Democrats.⁸⁹ Although the Communist and Peasant's party initially withdrew from the Conciliation Committee which was officially drafting the Constitution – the Socialists participated only as observers due to a dispute regarding whether the Rada should be bicameral – these parties were lured back to the table by President Kuchma's promise of a unicameral Rada.⁹⁰

The fall of the Soviet Union created an atmosphere which was conducive to the growth of "new" parties or, more precisely, the growth of parties other than the Communist party and its descendants which all wished to have input in the drafting of the Constitution.⁹¹

⁸⁴ See Vladimir Skachko, *Ukrainian President Calls Referendum on Constitution*, SEVODNYA, June 28, 1996, at 1, condensed in CURRENT DIGEST OF THE POST-SOVIET PRESS, July 24, 1996, at 24.

⁸⁵ The legislative branch of the Ukrainian government is composed of democratically elected representatives who are chosen on a local district basis. See Barabash, *supra* note 69.

⁸⁶ See *id.* at 25.

⁸⁷ See *id.* at 25 (describing Communist support for the old Soviet Constitution rather than the proposed Constitution).

⁸⁸ See *Country Report: Ukraine*: ECONOMIST INTELLIGENCE UNIT COUNTRY REP., 3rd Quarter 1996, at 11 [hereinafter *Ukraine*, 3rd Quarter].

⁸⁹ See Visnyk, *Comparative Characteristics of Various Drafts of the New Constitution of Ukraine Prepared by the Constitutional Commission and Political Parties*, 1996 PARLIAMENTARY DEVELOPMENT PROJECT 1 (charting and distinguishing the characteristics of drafts written by the different political parties and the Constitutional Commissions).

⁹⁰ See *Ukraine*, E. EUR. CONST. REV., Spring-Summer 1996, at 27, 28. Presumably the parties which refused to participate without the promise of a unicameral Rada felt that such organization would maximize the possibility that they would control the Rada. See Zamyatin, *supra* note 78, at 21. They were probably persuaded by the tradition of a unicameral legislature, or feared a bicameral legislature would lead to federalization of Ukraine and a loss of independence. See *id.*

⁹¹ See KUZIO & WILSON, *supra* note 80, at 18-41.

One of the notable parties which emerged after the fall of the USSR is the Green party.⁹² The Green party has its genesis in the Chernobyl disaster and the other environmental catastrophes of the Soviet period.⁹³ As the name implies, the Green party's interests are centered around environmental protection.⁹⁴ The Green Party's impact in the Constitutional drafting process can be seen in the environmental protection clause in the Constitution.⁹⁵ The Nationalist parties, although weakened by some seventy years of international communist rule, still exist and are popular in western Ukraine.⁹⁶ These Nationalist parties are not national socialists but rather democratic in their ideology.⁹⁷ Christian Democrats have also created a party.⁹⁸ Indeed, Christianity, although never truly exterminated in Ukraine, has experienced a popular re-birth since religious freedom was established.⁹⁹

One of the largest problems encountered during the drafting of the Constitution was a lack of consensus.¹⁰⁰ When one compares the three most important draft proposals of the Constitution (Nationalist, Communist faction of the Rada, and Christian Democrat proposals) with the current 1997 Constitution, it appears that the Constitution is one of compromise.¹⁰¹ Such deduction may lead to the conclusion that items not chosen were intended to be excluded from the Constitution.

When one compares the various drafts of the Constitution proposed by the Ukrainian political parties and the language adopted, clear choices by the Rada are evident.¹⁰² Overall, the draft proposed by the Communist faction of the Rada (which is similar – in major

⁹² See SOLCHANYK, *supra* note 52; Roman Szporluk, *National Reawakening: Ukraine and Belorussia*, in *THE SOVIET EMPIRE: THE CHALLENGE OF NATIONAL AND DEMOCRATIC MOVEMENTS* 75, 78, 90 (Uri Ra'Anan ed., 1990) (stating that Chernobyl stimulated Ukrainian nationalist movements).

⁹³ See SOLCHANYK, *supra* note 52, at xix-xx.

⁹⁴ See *id.*

⁹⁵ See UKRAYNSKA KONSTITUZIYA ch. II, art. 50 (1996) (Ukr.).

⁹⁶ See WILSON, *supra* note 32, at 152 (noting that Ukrainian liberation struggles have served to mobilize nationalists in western Ukraine).

⁹⁷ See *id.* at 148. See generally Rusnachenko, *supra* note 69 (discussing the relationship between the Workers' and National Democratic Movements in Ukraine).

⁹⁸ See Visnyk, *supra* note 89.

⁹⁹ See SUBTELNY, *supra* note 1, at 193-94, 400-02, 519-20, 541.

¹⁰⁰ See Judge Bohdan A. Futey, *Ukraine's Draft Constitution Meets Political Reality*, E. EUR. CONST. REV. 14 (Winter 1993).

¹⁰¹ See Visnyk, *supra* note 89.

¹⁰² See *id.*

parts identical – to the USSR Constitution) has been rejected.¹⁰³ The drafts proposed by the Congress of Ukrainian Nationalists and the Christian Democratic Party (which are substantially similar) were adopted virtually verbatim.¹⁰⁴ As the drafts of the parties which favor personal liberty and democratic ideals were the basis of the Constitution, it is clear that their intent, even if not stated eloquently, should be the basis of Constitutional interpretation. In short, the framers' intent was democratic and favored individual freedom.

III. THE CONSTITUTIONAL COURT'S ROLE IN INTERPRETING THE CONSTITUTION¹⁰⁵

Ukraine's Constitution purports to protect virtually all the rights which the U.S. Constitution does by direct statement or judicial interpretation.¹⁰⁶ Guaranteed rights include the negative provisions which prohibit the government from acting, such as freedom of speech, religion, assembly, personal affairs, movement, freedom to strike, own property, protect one's intellectual property, conduct entrepreneurial activity, vote, and the right to privacy in one's correspondence and dwelling place.¹⁰⁷ The Constitution also prohibits the government from subjecting a citizen to double jeopardy, retroactive laws, and providing unequal protection under the law.¹⁰⁸ Moreover the Constitution states that the enumeration of rights is not exhaustive and may not be degraded.¹⁰⁹

A. *Procedural Issues Involved with Bringing a Case Before the Constitutional Court*

The Constitutional Court of Ukraine is the sole interpreter of the Ukrainian Constitution¹¹⁰ and its decisions are binding upon the par-

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See generally, e.g., 'Visnyk Konstytutsiynoho Sudu Ukrainy' Bimonthly Sees the Light, AMERICA, Nov. 1, 1997, at 11 (stating that *Visnyk Konstytutsiynoho Sudu Ukrainy* is the bulletin of the Constitutional Court).

¹⁰⁶ Compare UKRAYNSKA KONSTITUZIYA ch. II (1996) (Ukr.) with U.S. CONST. amend. I-X.

¹⁰⁷ See UKRAYNSKA KONSTITUZIYA ch. II, arts. 21, 22, 24, 30-36, 38, 39, 41, 42, 44, 51, 52, 54, 58, 61-63 (1996) (Ukr.).

¹⁰⁸ See *id.* at arts. 24, 58, 61.

¹⁰⁹ See *id.* art. 22.

¹¹⁰ There is some dispute as to whether all courts or just the Constitutional Court may interpret the Constitution. See *Analysis of the Draft Law on the Judicature for*

ties and throughout Ukraine prospectively.¹¹¹ The Constitutional Court may declare statutory acts as well as presidential edicts unconstitutional and thereby nullify their operation.¹¹² Ukraine has created a concentrated system of judicial review in which only one court is able to interpret the Constitution.¹¹³ The enabling legislation for the Constitutional Court came into effect on October 16, 1996 and it began accepting cases on January 1, 1997.¹¹⁴

The Law of Ukraine on the Constitutional Court of Ukraine (Law on the Constitutional Court) does not permit private citizens to file appeals before the Constitutional Court.¹¹⁵ A private citizen may,

Ukraine, A.B.A. CENT. AND E. EUR. L. INITIATIVE, June 20, 1997, 3, 8. Ivan Tymchenko, Chairman of the Constitutional Court (equivalent to U.S. Chief Justice), stated that the Constitutional Court will interpret the Constitution alone and the Supreme Court of Ukraine will have to stay proceedings during the process. See Roman Woronowycz, *Ukraine's Court System: The Constitutional Court*, UKRAINIAN WKLY., Mar. 2, 1997, at 3.

¹¹¹ See Futey, *supra* note 8, at 15, 16, 17. The Constitutional Court's jurisdiction is limited to interpreting the Constitution. See *id.* at 16. Courts of general jurisdiction, of which the highest court is the Supreme Court of Ukraine, have jurisdiction over all other matters. See *id.* The Crimean Constitution is part of Ukrainian law and subject to the Constitution. See *Law on Crimean Constitution is Approved*, CURRENT DIGEST OF THE POST-SOVIET PRESS, Apr. 17, 1996, at 22 (condensing and translating Vladimir Skachko, SEVODNYA, Mar. 23, 1996, at 4).

¹¹² See Yurii S. Shemshuchenko, *The "President" and State Authorities in Ukraine*, in GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R. 151, 154 (James E. Hickey, Jr. & Alexej Ugrinsky eds., 1996) (stating that the president may not interfere with the Constitutional Court).

¹¹³ See ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 185 (1989) (defining a concentrated system of judicial review). Ukraine may, however, have a mixed system as the Ukrainian Supreme Court is empowered to interpret the decisions of the Constitutional Court. See generally *id.* at 265-326; Law of Ukraine on Statutory Legal Acts of Ukraine art. 133, 138 (1995) (Ukr.), translated in *Law of Ukraine on Statutory Legal Acts of Ukraine*, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1 (stating that the Constitutional Court is "to determine the constitutionality of explanatory acts" relating to the status of Ukrainian citizens).

¹¹⁴ See Futey, *supra* note 8, at 15, n.3; *Constitutional Court Established*, UKRAINIAN LEGAL & ECON. BULL., Nov. 1996, at 5. The Law of Ukraine on the Constitutional Court of Ukraine was drafted and passed by the Rada. See Futey, *supra* note 8, at 15. The law contains a number of unclear and repetitive provisions as well as arguably inadequate protection of citizens' rights. See *Analysis of the Draft Law on the Judicature for Ukraine*, *supra* note 110, at 3.

¹¹⁵ See Futey, *supra* note 8, at 18. The standing commissions of the Rada can apply to the Constitutional Court for opinions. See Law of Ukraine on the Standing Commissions of the Verkhovna Rada of Ukraine, art. 14 (1995) (Ukr.), translated in *The*

however, be able to bring a case before the Constitutional Court by filing or defending an action in a court of general jurisdiction, in which case the judge would be responsible for filing an appeal with the Constitutional Court if issues requiring Constitutional interpretation were presented.¹¹⁶ For instance, if a criminal case involved an issue of privacy rights (i.e. police search), the court of general jurisdiction would file an interlocutory appeal with the Constitutional Court¹¹⁷ and the case would be halted until the constitutional issue was resolved.¹¹⁸

A citizen may also directly petition the Constitutional Court under Article 42 of the Law on the Constitutional Court if that person's rights are violated – or may be violated – by a law which is unconstitutional.¹¹⁹ This route is by petition, not appeal from a decision. Thus, in essence, a citizen may file a petition in regard to a law which is never enforced against that citizen. Due to the concentration of all constitutional interpretive power in the Constitutional Court, the Court has been burdened with an enormous case load with over 1,000 petitions filed and a number of appeals filed in the spring of 1997.¹²⁰

The speed at which the Constitutional Court can decide these cases is questionable. As a result, the length of time that must be allocated for important decisions is unclear.¹²¹ The courts of general ju-

Law of Ukraine on the Standing Commissions of the Verkhovna Rada of Ukraine, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1.

¹¹⁶ See Futey, *supra* note 8, at 19 (citing The Law of Ukraine on the Constitutional Court).

¹¹⁷ See Woronowycz, *supra* note 110, at 3.

¹¹⁸ See *id.* at 3.

¹¹⁹ See Futey, *supra* note 8, at 21 (citing The Law of Ukraine on the Constitutional Court).

¹²⁰ See *id.* at 22.

¹²¹ Appeals are, basically, discretionary although it is unclear how much latitude the Constitutional Court has to refuse cases over which it clearly has jurisdiction. See *id.* at 21, 22. Discretionary means that the Constitutional Court has the power to refuse cases not within its jurisdiction (which is limited to violations of the Constitution and, especially relevant here, laws which violate citizens' rights under the Constitution) and possibly even cases within its jurisdiction. See *id.* In concluding that the Constitutional Court has jurisdiction, it must conduct an interpretive act. One example would be a petition for the violation of a citizen's right to freedom of speech, where the Constitutional Court would have to determine that the law which was in question was (at least arguably) unconstitutional prior to having jurisdiction. See generally *id.* Such predetermination for jurisdiction should be avoided by finding that the filing of an appeal or petition simply creates jurisdiction. The procedure laid

risdiction have jurisdiction over "criminal behavior" which is described as an illegal act of the state rather than an unconstitutional law.¹²²

Additionally, the procedure for the appointment of Constitutional Court judges raises another issue, as terms of appointment are for nine years without possibility of re-appointment, rather than life tenure.¹²³ The judgeships will, presumably, come up for reappointment¹²⁴ concurrently, leading to the natural question of whether or not judges are being chosen with an eye toward particular outcomes of pending cases. Judges on the Constitutional Court may also be tempted to decide cases with an eye toward future political or employment aspirations rather than strictly relying upon the law, which is particularly so, in areas where the law is fuzzy, such as the claw back provisions.¹²⁵

B. Interpreting the Constitution: Methods Used by Other Courts and the Appropriate Method for Ukraine

The threshold question with which the Constitutional Court must deal is the problem of interpreting a document which encodes social goals as positive Constitutional rights.¹²⁶ Social and economic rights reduce the legitimacy of the entire document as they are effectively unenforceable, yet given preeminence next to rights which are in-

out by the law on the Constitutional Court seems to reject this possibility in that the procedure for accepting a case is multileveled and requires the issue to be one requiring Constitutional interpretation. *See generally id.*

¹²² *See id.* at 18 n.11.

¹²³ *See id.* at 17.

¹²⁴ *See Futey, supra* note 8, at 17. The Constitutional Court Judges were appointed at the same time with all their terms limited to nine years, therefore, so long as a significant number of the Judges do not die or retire while in office the Constitutional Court will be virtually replaced in its entirety in nine years. *See generally id.*

¹²⁵ *See id.* at 17.

¹²⁶ *See generally Futey, supra* note 7, at 28-30.

Social goals which are stated in the Constitution as positive rights of citizens include: (1) the right to work; (2) the right to rest; (3) the right to be provided for when disabled; (4) the right to housing; (5) the right to an acceptable standard of living; (6) the right to protection of health; (7) the right to education; and (8) the right to environmental protection. *See UKRAYNSKA KONSTITUZIYA* ch. II, arts. 43, 45-49, 50, 53 (1996) (Ukr.). *See generally* José Maria Morenilla Rodriguez & Jean-Claude Soyer, *Report on the Legislation of Ukraine*, 16 HUM. RTS. L. J. 344, 348 (1995) (stating that three general areas of rights are granted: (1) civil and political; (2) procedural and criminal; and (3) social and economic).

tended to limit government action and are, hence, enforceable.¹²⁷ Although there is some question as to whether the Constitution is enforceable in some parts – and whether this determination could erode the effectiveness of other rights provisions – this Note will assume that the Constitutional Court will enforce all of the Constitution's provisions.¹²⁸

Constitutional interpretation, especially in the field of citizens' rights will probably center around provisions which limit citizens' rights.¹²⁹ As previously noted, the provisions which limit a Constitutional right – in the interest of public order, morality, or the rights and freedoms of others – are termed claw back provisions.¹³⁰ One right so limited is the right to freedom of thought and speech:

Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice. The exercise of these rights may be restricted by law in the interests of *national security, territorial indivisibility or public order*, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.¹³¹

These limitations are vague¹³² as the broad wording of the claw backs gives the Rada much discretion to limit rights.¹³³ They may be

¹²⁷ See Futey, *supra* note 7, at 30.

¹²⁸ See generally Svetlana N. Kravchenko, *Federalism and Problems of Environmental Protection in Sovereign Ukraine*, in GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R.: POWER ALLOCATION AMONG CENTRAL, REGIONAL, AND LOCAL GOVERNMENTS 290, 292-95 (James E. Hickey, Jr. & Alexej Ugrinsky eds., 1996) (stating that it is the domain of the courts to protect citizens' rights and the environment).

These social goals (or positive rights) would have been more appropriately placed in the preamble of the Constitution. See Futey, *supra* note 7, at 30.

¹²⁹ See generally Futey, *supra* note 7, at 30, 31 (examining claw-back provisions concerning citizens' rights).

¹³⁰ See *id.* at 30. Provisions which permit degradation of the granted right are also termed "derogatory clauses." See *Black v. Law Society of Canada*, [1986] A.R. 259, 275, *appeal dismissed*, [1989] 1 S.C.R. 591.

¹³¹ UKRAYNSKA KONSTITUZIYA ch. II, art. 34 (1996) (Ukr.) (emphasis added).

¹³² See Serhiy Naboka, *Freedom of Press and Information Still Under Threat in Ukraine Part I*, UKRAINIAN WKLY., Aug. 31, 1997, at 2 [hereinafter Naboka, *Part I*]

used, in their broadest reading, to limit the right which they qualify to the point of voiding that right.¹³⁴ To avoid nullifying the rights granted in the Constitution, the Constitutional Court must perform some variant of a balancing test.¹³⁵ In such a test, the Constitutional Court must balance the interests of the state and the people's interests in order to give full effect to all articles of the Constitution.¹³⁶ When a test is not specified, the court must determine the appropriate test.¹³⁷ The court should consider the larger objectives of the Constitution in constructing the test which include: (1) the historic origins of the rights enshrined; and (2) the relationship between the articles in the document.¹³⁸

The plain language of the Constitution may lead one to a bifurcated analysis of laws limiting rights within the meaning of the claw back provisions.¹³⁹ First, one must determine if the law was pursuing a legitimate governmental interest within the meaning of the claw back, such as national security, public safety, territorial indivisibility, or

(noting that eliminating false accusations against public officials and insults have been held permissible state ends in regulating speech).

¹³³ See BERNARD H. SIEGAN, *DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM* 34-36 (2nd ed. 1994) (arguing that the Constitution is inconsistent with aspirations of freedom and abundance).

¹³⁴ See Futey, *supra* note 7, at 30; Black, [1986] A.R. 259 at 275.

¹³⁵ See Black, [1986] A.R. 259 at 275; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328-29 (1816); *Lochner v. New York*, 198 U.S. 45, 53 (1905) (balancing property rights with the concept of liberty). See generally *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (balancing the interests between employer and employee).

¹³⁶ See *Germany v. Barthold*, 90 Eur. Ct. H.R. (ser. A) at 21-25 (1985); *Austria v. Lingens*, 103 Eur. Ct. H.R. (ser. A) at 34 (1986); *Home Bldg. & Loan Ass'n* 290 U.S. at 442, 444; *Martin*, 14 U.S. at 328-29. See generally *Lochner*, 198 U.S. 45; *West Coast Hotel Co.*, 300 U.S. 379 (balancing the interests between employer and employee).

¹³⁷ See *Black v. Law Society of Canada*, [1986] A.R. 259, 276, *appeal dismissed*, [1989] 1 S.C.R. 591.

¹³⁸ See *id.* at 269 (quoting *Regina v. Big M Drug Mart*, [1985] 3 W.W.R. 481, 524).

¹³⁹ See UKRAYNSKA KONSTITUZIYA ch. II, arts. 34, 35, 36 (1996) (Ukr.). Such analysis may be impractical as some articles of the current Ukrainian Constitution include the purpose/interest distinction (*e.g.* article 34) while others simply state that the right may be restricted in the interests of certain principles (*e.g.* articles 35, 36). See *id.*

health and morality of the population.¹⁴⁰ Second, the law's purpose must be analyzed to determine if it comports with the purposes allowed in the claw back; such as public safety, morality, and the rights and freedoms of others.¹⁴¹ Hence, though a bifurcated analysis is possible under the plain language of the Constitution, such analysis is clearly inadequate to protect individual rights. Such analysis provides no real limits to governmental power, for one can imagine no law of the Soviet regime which would not pass this cursory scrutiny, all Soviet laws were to *pursue* national security and public safety in the *interest of public safety and morality*.¹⁴² Hence, a balancing test is more appropriate.

In conducting this balancing test, the Constitutional Court should weigh the rights of citizens more heavily than the interests of the state.¹⁴³ Soviet history reveals a long-standing pattern of disregard for human rights and rule of law.¹⁴⁴ The Constitution attempts to reverse that trend.¹⁴⁵ Such constitutional intent to limit governmental power is evident from the constitutional provisions which provide for monetary damages against the government when one's rights are violated.¹⁴⁶ Soviet-style government and abuse of human rights are also shown to be against the intent of the Constitution through constitutional prohibitions on parties controlling the government and the enumeration of

¹⁴⁰ See *id.* (describing permissible governmental interests in restricting freedom of speech, freedom of religion and philosophy, and freedom of association as including some or all of national security, territorial indivisibility, public order, morality of the population, protecting the rights and freedoms of other citizens, or health of the population).

¹⁴¹ See *id.* (stating that such purposes include preventing disturbances or crimes, protecting the health of the population, protecting the reputation or rights of other persons, protecting confidential information, or protecting impartial justice).

¹⁴² See generally *New York v. Belton*, 453 U.S. 454 (1981) (expanding permissible police searches of an automobile under a reasonableness standard); *California v. Greenwood*, 486 U.S. 35, 37 (1988) (holding that a U.S. citizen has no privacy interest in garbage placed at the curb for collection).

¹⁴³ See *Black v. Law Society of Canada*, [1986] A.R. 259, 288, 298, *appeal dismissed*, [1989] 1 S.C.R. 591 (quoting *Regina v. Big M Drug Mart*, [1985] 3 W.W.R. 481, 524).

¹⁴⁴ See SUBTELNY, *supra* note 1, at 413-21, 478, 500-03.

¹⁴⁵ See Futey, *supra* note 7, at 29; Law of Ukraine on Statutory Legal Acts of Ukraine art. 4 (1995) (Ukr.), translated in *Law of Ukraine on Statutory Legal Acts of Ukraine*, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1 (stating that the Constitution has the highest legal effect and ordinary laws must conform to it).

¹⁴⁶ See Futey, *supra* note 7, at 34.

human rights as protected citizens' rights.¹⁴⁷ Hence, due to historical precedent and the drafters' intent to avoid future abuses, the claw back provisions should be construed narrowly against the government.¹⁴⁸

Politics and the economy mandate a narrow reading of the claw back provisions against the government. Politically, the draft of the Constitution with broader claw back provisions proposed by the Communist faction of the Rada was rejected for the narrower provisions in the Nationalist and Christian Democrat draft proposals.¹⁴⁹ The rejection of Soviet-style government which was proposed by the Communist faction of the Rada¹⁵⁰ shows an intent not to follow its traditions of state control. Furthermore, the adoption of proposals by parties which do not favor extensive government controls on citizens' lives shows an intent to grant citizens broad, meaningful rights. Hence, the claw back provisions should be construed narrowly to give full effect to the political intent of the drafters of the Constitution.¹⁵¹

Ukraine's current economic situation does not provide a valid reason for construing rights provisions in the government's favor. Ukraine's economy is improving and government intrusion has proven to be ineffective and actually harmful in the past – as shown by the fall of the USSR and the collapse of the Soviet economy.¹⁵² Ukraine's transition to a market economy requires not only economic,

¹⁴⁷ See *id.* at 29; A. Lytvynenko, *The Law and the Culture: Theory and Practice*, PRAVO UKRAEINY: EHURYDYCHNYAI EZIHURNAL, June 1997, at 92 (arguing that Soviet law was to accomplish a political agenda, but that present law should safeguard culture and the values of the community); UKRAYNSKA KONSTITUZIYA ch. II, art. 37 (1996) (Ukr.). See generally Mykola Ryabchuk, *Democracy and the So-Called "Party of Power" in Ukraine*, 3 POL. THOUGHT (1994) at 154 (discussing the role of the post-communist *nomenklatura* in Ukraine).

¹⁴⁸ See discussion *infra* Sections I., II. The inclusion of the claw back provision in the Constitution may have been due to an intent to copy the European Convention on Human Rights, due to political necessity, or both.

¹⁴⁹ See Visnyk, *supra* note 89.

¹⁵⁰ See *id.*

¹⁵¹ See discussion *infra* Sections II, IV.B. See generally Futey, *supra* note 7, at 30-31 (concerning clawback provisions as related to citizens' constitutional rights).

¹⁵² See generally Futey, *supra* note 7, at 30; KUZIO & WILSON, *supra* note 80, at 39; *Ukraine*, 1st Quarter *supra* note 70, at 11; *Country Profile: Ukraine*, ECONOMIST INTELLIGENCE UNIT COUNTRY PROFILE, 1996-1997 [hereinafter *Ukraine*, 1996-1997]; *Country Report: Ukraine*, ECONOMIST INTELLIGENCE UNIT COUNTRY REP., 2nd Quarter 1997 [hereinafter *Ukraine*, 2nd Quarter]; *Ukraine*, 4th Quarter, *supra* note 79; *Ukraine*, 3rd Quarter, *supra* note 87.

but also personal, freedom in order to flourish.¹⁵³ Ukraine's economy, therefore, not only supports a broad reading of citizens' rights and a narrow reading of the claw back provisions, but depends on such interpretation for its success.¹⁵⁴

The question remains as to how the Constitutional Court might arrive at an interpretation. I propose that when a right is granted but limited by public order, health, morality, the rights and freedoms of others, or the action of law (or all of these), the limit should be strictly construed. The appropriate test is formulated by requiring absolute governmental necessity to facilitate a clear government interest linked with clear support by the plain language of the claw back provision of the government's asserted objective, as well as a narrow tailoring of the means to the legitimate ends enumerated in the claw back. Public order must be interpreted narrowly to avoid the excesses of the Soviet period when it was used to restrict the rights of those who disagreed with the government.¹⁵⁵ A narrow reading of the public order exception on a given right would force the government to show an imminent danger which is sufficiently dangerous to the state (for example, armed insurrection, rather than a peaceful demonstration).

When taken together with other claw back terms, which may be interpreted as a whole, public order may be interpreted to require danger to health, morality, or the rights and freedoms of others. The rights and freedoms of others must also be construed narrowly so that no more restrictions are placed on the activities of citizens than the government. The claw backs must also be interpreted not to apply when rights are specifically granted to individuals. Health, when construed narrowly, requires an imminent danger of death or grievous bodily harm to other persons. Such restriction is reasonable when construed narrowly and applied to extreme cases (for example, screaming "fire" in a crowded theater as a limit on freedom of speech).

Probably the most amorphous concept is morality. Strictly speaking, the criminal nature of all crimes is a moral choice; for example murder is a moral interpretation and morality determines when it is illegal (such as in war) or permissible (such as in the case of self-defense). A strict reading of morality would limit its application to circumstances requiring a moral choice to make an act criminal, in essence limiting morality exceptions to those instances which are historically and virtually uniformly acknowledged by current western

¹⁵³ See Futey, *supra* note 7, at 30.

¹⁵⁴ See discussion *infra* Section IV. A,B; Futey, *supra* note 7, at 30.

¹⁵⁵ See generally Futey, *supra* note 7, at 29 (stating that the intent of the Constitutional drafters was to avoid Soviet-style rule).

thought as being immoral. When strictly construed the claw back provisions have the potential for innocuous action and need not negate the rights which they qualify.¹⁵⁶

"Established by law" or "envisaged by law" are other problematic terms in the Constitutional rights grants.¹⁵⁷ In its broadest reading, simple laws which do not have the legal force of a constitution and are not enacted by similar procedures requiring a super-majority in the Rada could serve to overrule the Constitution.¹⁵⁸ It is illogical for simple laws to be able to override a Constitution which purports to be the supreme law of Ukraine.¹⁵⁹ Future laws should, therefore, be construed to violate the Constitution when they go beyond regulatory functions and begin to erode the right itself. The proper way to change Constitutional law is through the amendment process, not by the less stringent process of enacting legislation.¹⁶⁰

Although the proceeding proposal appears to be the most appropriate interpretive test for Ukraine's unique position and history,¹⁶¹ national and supra-national courts have articulated other tests. One

¹⁵⁶ Cf. Tatyana Ivzhenko & Roman Stoyanov, *Ukraine Could Get a Very Good Constitution*, NEZAVISIMAYA GAZETA, Dec. 7, 1995, at 1, condensed in CURRENT DIGEST OF THE POST-SOVIET PRESS, Jan. 3, 1996, at 24, 24 (arguing that the claw backs are insignificant and will not harshly limit the right with which they are associated).

¹⁵⁷ See UKRAYNSKA KONSTITUZIYA ch. II, arts. 29, 30, 31, 32, 33 (1996) (Ukr.).

¹⁵⁸ See generally Futey, *supra* note 7, at 30.

¹⁵⁹ See Law of Ukraine on Statutory Legal Acts of Ukraine art. 4 (1995) (Ukr.), translated in *Law of Ukraine on Statutory Legal Acts of Ukraine*, 1995 PARLIAMENTARY DEVELOPMENT PROJECT 1.

¹⁶⁰ See UKRAYNSKA KONSTITUZIYA ch. II, art. 57 (1996) (Ukr.) (requiring that notice be given of new laws by a method "established by law" – without such notice the law is not in force).

¹⁶¹ The Constitution was adopted by the Rada rather than by a popular vote. See Skachko, *supra* note 84, at 24 (describing the Rada's marathon – about 25 hours – session which adopted the Constitution). The Rada clearly has greater bargaining power, sophistication, and the ability to write a clear Constitution (reducing reliance by citizens who act within what they believe to be their rights) – in short, the Constitution could be interpreted as an adhesion contract. That interpretation would lead to interpreting the Constitution against the government whenever there is an ambiguity and the citizen's legal theory is reasonable. See, e.g., *Vargas v. Ins. Co. of N. Am.*, 651 F.2d 838, 839 (2nd Cir. 1981); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 76, 94-95 (N.J. 1960); see also, e.g., *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174 (Iowa 1975) (holding that the inevitable result of enforcing all provisions of an adhesion contract would be an abdication of judicial responsibility).

claw back provision interpretive method is a four part test.¹⁶² This method is used by the European Court of Human Rights to interpret the claw back provisions in the European Convention on Human Rights (the Convention).¹⁶³ The Convention tracks the wording of the Ukrainian Constitution with one major difference.¹⁶⁴ The Convention limits the operation of the claw backs to instances "necessary in a democratic society" while the Ukrainian Constitution omits this language.¹⁶⁵ One can imply such language in the Ukrainian Constitution due to its overall objectives which appear to be a democratic civil society.¹⁶⁶

This interpretive method first determines if there is an interference with an enumerated right by a public authority.¹⁶⁷ Second, the basis of the intrusion is ascertained.¹⁶⁸ If there is a basis in domestic law for the intrusion, the analysis continues – if there is no basis in domestic law, the intrusion is illegal.¹⁶⁹ The next phase of the test involves the interpretation of the claw back provision – if the purpose of the interference with the right enumerated is covered by the claw back (i.e. public order), the process continues. If the purpose of the intrusion is to do away with the enumerated right, it is illegal.¹⁷⁰ The intrusion into the protected right is then subjected to a "pressing social need" standard (not "useful, reasonable, desirable, or indispensable").¹⁷¹ The basis of this standard is that intrusion into rights should not be allowed unless it is "necessary" in a "democratic society."¹⁷²

¹⁶² See *Germany v. Barthold*, 90 Eur. Ct. H.R. (ser. A) at 21-25 (1985).

¹⁶³ See *id.*

¹⁶⁴ Compare UKRAYNSKA KONSTITUZIYA ch. II, art. 35 (1996) (Ukr.) with European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 212, 230.

¹⁶⁵ Compare UKRAYNSKA KONSTITUZIYA ch. II, art. 35 (1996) (Ukr.) with Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, 213 U.N.T.S. 222, 230.

¹⁶⁶ See Rodriguez & Soyer, *supra* note 126, at 349, 358-60 (arguing that claw back provisions must be minimal and conform with the theory of democratic society).

¹⁶⁷ See *Barthold*, 90 Eur. Ct. H.R. (ser. A) at 21.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 23.

¹⁷¹ *Id.* at 25.

¹⁷² *Id.* at 23. See *Black v. Law Society of Canada*, [1986] A.R. 259, 288, 298, *appeal dismissed*, [1989] 1 S.C.R. 591 (quoting *Regina v. Big M Drug Mart*, [1985] 3 W.W.R. 481, 524).

Moreover, the intrusion into a constitutionally protected right must be "proportionate to the legitimate aim pursued" by the government agency.¹⁷³ Further, the aim must be given by the governmental agency and be "relevant and sufficient."¹⁷⁴

Other courts use a tripartite test.¹⁷⁵ The first part is the determination of whether the intrusion into the enumerated right is prescribed by law.¹⁷⁶ The second part is to determine what the objective of the intrusion is, whether it is legitimate, and whether there is a relationship between the intrusion into the right and the legitimate objective as enumerated in the claw back.¹⁷⁷ If the limitation passes the first two parts of the test, it must be necessary in a democratic society or, more precisely, the limitation must aid free society more than the right being limited.¹⁷⁸ Moreover, the right and the limitation of the right must be weighed based on their social utility and importance in a free society.¹⁷⁹ This test also requires that no less intrusive means exist to pursue the legitimate government interest.¹⁸⁰

Due to the intent of the Constitution to change the Soviet system of government which did not respect the rights of citizens as protected in the Soviet Constitutions, the provisions which guarantee rights to citizens must be construed in a manner which is most favorable to those rights guaranteed.¹⁸¹ Further, one of these tests must be adopted due to the plain language of the Constitution. Article 1 states that Ukraine is a democratic and law-based state.¹⁸² Article 3 recognizes "[t]he human being, his or her life and health, honor and dignity, inviolability and security . . . as the highest social value" and that "[h]uman rights and freedoms and their guarantees determine the es-

¹⁷³ *Germany v. Barthold*, 90 Eur. Ct. H.R. (ser. A) at 25 (1985).

¹⁷⁴ *Id.*

¹⁷⁵ *See Austria v. Lingens*, 103 Eur. Ct. H.R. (ser. A) at 34 (1986); *Black*, [1986] A.R. at 259.

¹⁷⁶ *See Lingens*, 103 Eur. Ct. H.R. (ser. A) at 34; *Black*, [1986] A.R. at 285.

¹⁷⁷ *See Lingens*, 103 Eur. Ct. H.R. (ser. A) at 34; *see generally Black*, [1986] A.R. at 287 (quoting *Superintendent Central Prison v. Ram Manohar Lohia* A.I.R. 1960 S.C. 633, 640 that a limitation based on public order requires a nexus with public order which is not hypothetical or too remote in causal chain).

¹⁷⁸ *See Lingens*, 103 Eur. Ct. H.R. (ser. A) at 34; *Black*, [1986] A.R. at 285.

¹⁷⁹ *See Black*, [1986] A.R. at 285.

¹⁸⁰ *See id.*

¹⁸¹ *See generally Futey*, *supra* note 7, at 29-31.

¹⁸² *See UKRAYNSKA KONSTITUZIYA* ch. I, art. 1 (1996) (Ukr.).

sence and orientation of the activity of the state.”¹⁸³ Moreover, the rights granted are “not exhaustive,” “shall not be abolished,” and “shall not be diminished.”¹⁸⁴ Beyond the interpretive techniques outlined above, the Constitutional Court may go beyond the Constitution to find natural human rights as the rights enumerated in the Constitution are stated to be not exhaustive.¹⁸⁵ In any event, if Ukraine is to continue the development of its pro-Western national identity, the rights of its citizens must be emphasized.

IV. CONCLUSIONS AS TO THE FUTURE INTERPRETATION OF THE CLAW BACK PROVISIONS AND RECOMMENDATIONS AS TO UKRAINE'S FUTURE COURSE OF ACTION

A. The Current Economic Situation in Ukraine and the Effect it may have on Constitutional Interpretation

Outside pressures may effect the interpretation of a constitution – paramount in these is the economic situation in the nation.¹⁸⁶ The economic situation in a nation will affect politics and legal enactments as well as, potentially, Constitutional Court rulings.¹⁸⁷ In Ukraine's Constitutional Court, such pressure may be especially severe on Justices who are not appointed for life and, hence, may seek to protect their

¹⁸³ *Id.* art. 3.

¹⁸⁴ *Id.* art. 22.

¹⁸⁵ *See id.* (stating that the rights enumerated in the Constitution are not exhaustive). Such natural rights may be found in the body of Western thought and are substantially similar to the rights which are guaranteed in the Constitution if the claw back provisions are construed narrowly.

¹⁸⁶ *Compare* *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) *with* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution).

¹⁸⁷ *Compare* *Lochner*, 198 U.S. at 53 (holding that one does have a fundamental right to liberty of contract under the U.S. Constitution) *with* *West Coast Hotel Co.*, 300 U.S. 379 (holding that one does not have a fundamental right to liberty of contract under the U.S. Constitution). *See* *Black v. Law Society of Canada*, [1986] A.R. 259, 278-79, *appeal dismissed*, [1989] 1 S.C.R. 591 (arguing that the change in U.S. Constitutional interpretation from *Lochner* to *West Coast Hotel* was due to a change in the idea of freedom in the United States because of the economic situation).

future legal and political careers when interpreting the Constitution.¹⁸⁸ Further, the economy is currently Ukraine's greatest problem.¹⁸⁹

The current economic situation in Ukraine is improving.¹⁹⁰ The rates of increase of inflation and unemployment are falling and are predicted to continue decreasing, moving from a decrease in the rate of increase to an actual decrease in the rates of inflation and unemployment.¹⁹¹ Personal income appears to be improving and is predicted to begin increasing.¹⁹² In general, the Ukrainian economy appears to be improving, although it is still poor when compared with the industrial and post-industrial economies of Western Europe and America.¹⁹³

¹⁸⁸ See UKRAYNSKA KONSTITUZIYA ch. XII, art. 148 (1996) (Ukr.).

¹⁸⁹ See Victor P. Perebenessyuk, *The Potential for Conflict in Ukraine*, PERSP. CONTEMP. UKR., July-Aug. 1995, at 1, 2.

¹⁹⁰ See *Ukraine*, 1st Quarter *supra* note 70, at 11 (describing Ukraine's economic situation and related factors). See generally *Ukraine*, 1996-1997, *supra* note 152 (describing Ukraine's economy from 1996-97); *Ukraine*, 2nd Quarter, *supra* note 152; *Ukraine*, 4th Quarter, *supra* note 79; *Ukraine*, 3rd Quarter, *supra* note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy); *Guidelines for the Plan of Economic and Social Development and the State Budget of Ukraine for the Year 1994*, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1-9 (describing the government's plan to regulate the economy and foster economic growth) [hereinafter *Guidelines for the Plan of Development*].

¹⁹¹ See *Ukraine*, 1st Quarter *supra* note 70, at 11. See generally *Ukraine*, 1996-1997, *supra* note 152 (describing Ukraine's economy from 1996-97); *Ukraine*, 2nd Quarter, *supra* note 152; *Ukraine*, 4th Quarter, *supra* note 79 (describing Ukraine's economic situation and related factors); *Ukraine*, 3rd Quarter, *supra* note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).

¹⁹² See *Ukraine*, 1st Quarter *supra* note 70, at 11. See generally *Ukraine*, 1996-1997, *supra* note 152 (describing Ukraine's economy from 1996-97); *Ukraine*, 2nd Quarter, *supra* note 152; *Ukraine*, 4th Quarter, *supra* note 79 (describing Ukraine's economic situation and related factors); *Ukraine*, 3rd Quarter, *supra* note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).

¹⁹³ See *Ukraine*, 1st Quarter *supra* note 70, at 11. See generally *Ukraine*, 1996-1997, *supra* note 152 (describing Ukraine's economy from 1996-97); *Ukraine*, 2nd Quarter, *supra* note 152; *Ukraine*, 4th Quarter, *supra* note 79 (describing Ukraine's economic situation and related factors); *Ukraine*, 3rd Quarter, *supra* note 87, at 14-15 (describing the economic reorganization of cabinet members aimed at stimulating the economy).

While Ukraine's economy shows many positive signs, a full recovery may be distant.¹⁹⁴ Ukraine is, however, moving toward a Western economy as the shadow economy shrinks.¹⁹⁵ Ukraine has the potential for a strong economy due to its well trained workforce and excellent natural resources.¹⁹⁶ Moreover, Ukraine is demographically a Western nation with low rates of mortality and natural increase.¹⁹⁷ Although the legal framework for economic development is incomplete,¹⁹⁸ the main continuing problem is the industrial complex Ukraine inherited from the USSR at independence as it is "out-dated, energy intensive . . . and heavily polluting."¹⁹⁹

Perhaps the greatest economic pitfall in Ukraine's future is the energy crisis it faces.²⁰⁰ Ukraine currently must rely on Russia for much of its fuel.²⁰¹ Ukraine continues to attempt to reduce its dependence on Russian oil and gasoline.²⁰² There remains the potential for Russia to use Ukrainian dependence on Russian fuel to coerce political choices in Ukraine.²⁰³ As a lack of fuel can virtually shut down the Ukrainian economy, the card which Russia holds is a high one.²⁰⁴ It remains to be seen if Ukraine will reduce the potential for such Rus-

¹⁹⁴ See *Ukraine*, 2nd Quarter, *supra* note 152, at 9.

¹⁹⁵ See Dr. Serhii Teryokhin, *The Current Situation in Ukraine and Scenarios for the Future*, PERSP. CONTEMP. UKR., Sept.-Oct. 1995, at 2, 9-10.

¹⁹⁶ See UKRAINE AND UKRAINIANS THROUGHOUT THE WORLD 98-100 (Ann Lencyk Pawliczko ed., 1994).

¹⁹⁷ See Ralph S. Clem, *Demographic Trends in Ukraine in the Late Twentieth Century*, in THE UKRAINIAN ECONOMY: ACHIEVEMENTS, PROBLEMS, CHALLENGES 47, 47-49 (I.S. Koropecyk ed., 1992) (describing Ukraine's low rate of mortality, low birth rate and population growth rate).

¹⁹⁸ See *On Privatization in Ukraine*, UKRAINIAN LEGAL & ECON. BULL., July 1997, at 19, 21.

¹⁹⁹ *Ukraine*, 1996-1997, *supra* note 152, at 13.

²⁰⁰ See Oles M. Smolansky, *Ukraine's Quest for Independence: The Fuel Factor*, 47 EUR.-ASIA STUD. 67, 67-68 (1995).

²⁰¹ See *id.*; Conrad Fritsch, *Practical Experience in Restructuring Collective Agricultural Enterprises in Ukraine*, UKRAINIAN LEGAL & ECON. BULL., July 1997, at 14 (arguing that privatization of agricultural and other governmental holdings is also a serious problem).

²⁰² See Smolansky, *supra* note 200, at 74-75, 85.

²⁰³ See *id.*

²⁰⁴ See *id.* at 85; Oleh Havrylyshyn, *Ukraine's Economic Crisis and Western Financial Assistance*, 3 POL. THOUGHT (1994) at 161, 168.

sian coercion by finding other sources of energy²⁰⁵ or if Russia will continue to use this dependence for political coercion.²⁰⁶

Economically, the positive rights in the Constitution will be very expensive in a limited state budget.²⁰⁷ It is the duty of the Chamber of Accounting to pay for what is mandated in the Constitution.²⁰⁸ Hence, there is a legal mandate and an easily identifiable government agency to sue if the social rights are not fully implemented. Further, paying for the entitlements may be simply impossible, even under court order, as in 1996 alone the government was in arrears by 1.3 billion dollars in payments to its employees.²⁰⁹

If the Ukrainian economy experiences serious down turns or collapse, the Constitutional Court will be under considerable political pressure to allow significant government intrusion in all aspects of the economy and citizens' lives.²¹⁰ Politically, an economic crisis would tend to make the Soviet system appear more appetizing in spite of all its trappings of political and social repression.²¹¹ Hence an improving if not robust economy will be more conducive to reliable constitutional interpretation and political stability.²¹²

²⁰⁵ See Havrylyshyn, *supra* note 204, at 161-68.

²⁰⁶ Russia has threatened to cut off oil to Ukraine in the past. See Smolansky, *supra* note 200, at 74-75, 85.

²⁰⁷ See Decree of the Supreme Council of Ukraine on the Implementation of the Ukrainian Law "On the State Budget of Ukraine for 1994" (1994) (Ukr.), translated in *Decree of the Supreme Council of Ukraine on the Implementation of the Ukrainian Law "On the State Budget of Ukraine for 1994,"* 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1 (outlining the process for implementing the state budget) [hereinafter *On the State Budget of Ukraine for 1994*]; Law of Ukraine on the State Budget of Ukraine for 1994 (1994) (Ukr.), translated in *Law of Ukraine on the State Budget of Ukraine for 1994*, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1.

²⁰⁸ See Law of Ukraine on the Chamber of Accounting of the Verkhovna Rada of Ukraine art. 2, 36 (1996) (Ukr.), translated in *Law of Ukraine on the Chamber of Accounting of the Verkhovna Rada of Ukraine*, 1996 PARLIAMENTARY DEVELOPMENT PROJECT 1.

²⁰⁹ See *Ukraine*, 3rd Quarter, *supra* note 87, at 18.

²¹⁰ See generally RUDNYTSKY, *Trends*, *supra* note 19 (discussing the populist, conservative, communist, and nationalist trends which lie latent in Ukrainian political ideology); MOTYL, *supra* note 16; SUBTELNY, *supra* note 1, at 510-37 (discussing attempts to reform the Soviet regime and Ukraine's uncertain future).

²¹¹ See generally MOTYL, *supra* note 16; SUBTELNY, *supra* note 1, at 510-37 (discussing economic conditions and political attitudes in Ukraine).

²¹² See JOHN E. TEDSTROM, *UKRAINIAN REFORMS AND WESTERN ASSISTANCE: STRUGGLING TOGETHER TO STAY THE COURSE* (1996).

B. Political Dangers to the Citizens' Rights Granting Provisions Including Foreign Intervention

Ukraine must overcome a legacy of massive political and economic corruption as well as colonialism and the lack of civil society.²¹³ Ukraine faces several problems in overcoming these problems including: (1) the "party of power" namely the *nomenklatura*;²¹⁴ (2) Russian interference;²¹⁵ and (3) Ukraine's internal political situation.²¹⁶

Ukraine continues to be dominated by former Communists.²¹⁷ In fact, politics in Ukraine are dominated by a 9/36 formula in which out of a total population of 36 million, 9 million residents of Western Ukraine support democracy while 27 million Eastern Ukrainians, who actually decide the nation's course of action, favor a more Soviet-style government.²¹⁸ The Ukrainian Constitution shows this pro-Soviet bent in that the social guarantees in the Constitution were copied from the Soviet Constitution.²¹⁹

One of the greatest dangers faced by Ukraine is adverse foreign influence, namely from Russia.²²⁰ Russia considers Ukraine a security threat as an independent nation.²²¹ Ukraine is considered virtually a

²¹³ See Oksana Grabowicz, *The Legacy of Colonialism and Communism*, PERSP. CONTEMP. UKR., Mar.-Apr. 1995, at 1, 1, 10.

²¹⁴ See Ryabchuk, *supra* note 147, at 154, 159 (stating that the "party of power" (the Communist party which controlled Ukraine until recently) and the *nomenklatura* (the old party apparatus) must be appeased to insure reforms are successful).

²¹⁵ See Konstantyn Morozov, *Ukrainian Independence in the International Context*, PERSP. CONTEMP. UKR., Jan.-Feb. 1995 (visited Sept. 18, 1997) <http://www.sabre.org/huri/publications/persp_v2n1.html>.

²¹⁶ See Ihor Lysyj, *Former President Kravchuk Addresses Twin Cities Meetings*, UKRAINIAN WKLY., Sept. 14, 1997, at 3.

²¹⁷ See generally Barabash, *supra* note 69 (describing the democratization process in Ukraine).

²¹⁸ See Lysyj, *supra* note 216, at 3.

²¹⁹ See Melnyk, *supra* note 51.

²²⁰ See Morozov, *supra* note 215.

²²¹ See John W.R. Lepingwell, *The Russian Military and Security Policy in the "Near Abroad,"* SURVIVAL, Autumn 1994, at 70, 70-74, 79-80; Francis Fukuyama, *The Ambiguity of "National Interest,"* in RETHINKING RUSSIA'S NATIONAL INTERESTS 10, 18, 22 (Stephen Sestanovich ed., 1994) (stating that it is within Russia's national interest to protect Russian minorities in Ukraine and that the G-7 world would support Russia in doing so); Sergei B. Stankevich, *Toward a New "National Idea,"* in RETHINKING RUSSIA'S NATIONAL INTERESTS 24 (Stephen Sestanovich ed.,

province of Russia by Russian historians and culture.²²² In short, Russia views Ukraine as a nation which it can "work on" and as a nation which is not truly independent.²²³ Thus, Russian national identity is the USSR²²⁴ and as such, Ukraine is an integral part of Russian national identity.²²⁵ Past Russian influence on Ukraine has been disastrous for Ukrainian national identity and has resulted in personal tragedy for the Ukrainian populace.²²⁶ There is no reason to believe that future Russian domination will be more tolerable or productive.²²⁷

Notwithstanding future fears and choices as to how the citizens' rights provisions in the Constitution will be interpreted due to external forces and the party of power, current issues have arisen as to constitutional interpretation and enforcement.²²⁸ One such issue is the freedom of the press provision in the Constitution.²²⁹ Prior to the adoption of the Constitution, freedom of the press was in doubt.²³⁰ One such instance was in regard to those who spoke in a manner which would tend to be divisive to the various ethnic groups in Ukraine.²³¹

In August 1992, President Kravchuk issued a decree stating that those who used freedom of speech to split the population of Ukraine along ethnic lines would be expelled from Ukraine.²³² The danger continues today in that most popular television stations are controlled by the executive branch of the government as are one-quarter of the

1994) (arguing that Russia's national interest includes protecting ethnic Russians in the "near abroad").

²²² See SOLCHANYK, *supra* note 52, at 128.

²²³ See Arkady Moshes, *The Crisis in Ukrainian and Russian Policy*, MOSCOW NEWS, Aug. 8-14, 1996, at 5.

²²⁴ See Roman Solchanyk, *Russia, Ukraine, and the Imperial Legacy*, 9 POST-SOVIET AFF. 337, 339, 341-42 (1993).

²²⁵ See *id.* at 339.

²²⁶ See generally SUBTELNY, *supra* note 1, at 403-24, 453; SLUZHYNKA, *supra* note 48, at 100-02 (arguing that those who favor democracy have been systematically killed, depleting Ukraine's gene pool).

²²⁷ See Solchanyk, *supra* note 52, at 19, 20, 128; Grabowicz, *supra* note 213, at 8, 10.

²²⁸ See Naboka, *Part I*, *supra* note 132; Serhiy Naboka, *Freedom of Press and Information Still Under Threat in Ukraine*, UKRAINIAN WKLY., Sept. 7, 1997, at 14 [hereinafter Naboka, *Part II*].

²²⁹ See Naboka, *Part I*, *supra* note 132; Naboka, *Part II*, *supra* note 228, at 14.

²³⁰ See MOTYL, *supra* note 16, at 15.

²³¹ See *id.*

²³² See *id.*

5,500 publications in Ukraine.²³³ State control of instruments of mass media may be unconstitutional due to Article 42 which prohibits the wrongful use of monopolies.²³⁴ Another constitutional question is whether the state can tax publications so as to control them, which may be prohibited by Article 92.²³⁵ Further, writers need licenses to sell their work, which may lead to censorship,²³⁶ and many members of the press have been murdered after printing articles about government corruption and theft.²³⁷ It remains to be seen how these issues will be resolved but, if such state control of the press is allowed, the Constitutional guarantee of freedom of speech appears to be in jeopardy.²³⁸

The rule of law is also jeopardized by President Kuchma's apparent dislike of the Constitution.²³⁹ If political leaders and, thereby, the government itself does not respect or follow the Constitution, earlier USSR patterns of simply ignoring the law may reoccur. It is of utmost importance, if the rule of law is to prevail, that the Constitution and the decisions of the Constitutional Court be followed no matter how unpopular or harmful to personal political careers.

Political infighting as well as fragmented political parties also continue to plague Ukraine.²⁴⁰ The Rada has adhered to Western principles and rejected Communist proposed Constitutional amendments

²³³ See Naboka, *Part I*, *supra* note 132; Naboka, *Part II*, *supra* note 228, at 14 (stating that the Ukrainian Center for Economic and Political study believes that the economic advantages government owned media have over private media sources violates the prohibition on the wrongful use of monopolies and taxation in Articles 42 and 92 of the Constitution).

²³⁴ See Naboka, *Part I*, *supra* note 132; Naboka, *Part II*, *supra* note 228, at 2, 14 (stating that the Ukrainian Center for Economic and Political study believes that the economic advantages government owned media have over private media sources violates the prohibition on the wrongful use of monopolies and taxation in Articles 42 and 92 of the Constitution).

²³⁵ See Naboka, *Part II*, *supra* note 228, at 14; *Harvard Symposium Regarding: "Freedom of Speech,"* UKRAINIAN WKLY., Aug. 24, 1997, at 8 (stating that a license is required to sell publications).

²³⁶ See *Harvard Symposium Regarding: "Freedom of Speech," supra* note 235, at 16.

²³⁷ See Mykola Svitukha, *Unpunished Crimes*, SVOBODA, Sept. 23, 1997, at 2.

²³⁸ See Naboka, *Part I*, *supra* note 132; Naboka, *Part II*, *supra* note 228.

²³⁹ See S. Holovatey *Criticizes the Organs of the Government*, SVOBODA, Sept. 25, 1997, at 1 (stating that Holovatey commented that President Kuchma asked him to sabotage the passage of the Constitution).

²⁴⁰ See Melnyk, *supra* note 51.

which would have limited the Constitutional Court's power and transfer its interpretive power to the Rada.²⁴¹ The Communist Party, however, continues to wage war on these democratic forces by insinuating that the democratic forces are anti-Constitution because the social rights in the Constitution are not being enforced (due to a lack of funds).²⁴² Political reprisals also continue and may even involve the filing of criminal charges and the denial of medical care while in jail.²⁴³ Further, the Rada began impeachment proceedings against President Kuchma for vetoing a bill three times²⁴⁴ which may indicate cracks opening in the rule of law.

The recent elections to the Rada may determine how the interpretation of the Constitution will unfold.²⁴⁵ On August 28-29, 1997, the Rada, in special session, did not pass proposed constitutional amendments which were mainly proposed by the left.²⁴⁶ As the elections to the Rada, in the spring of 1998, created a Socialist/Communist majority, it is possible that the Constitution will be significantly amended.²⁴⁷ This may include giving power back to local Radas which are mostly leftist, thereby diluting presidential power.²⁴⁸

In fact, some predict continuing Socialist/Communist control of the Rada.²⁴⁹ If democratic forces retain control (whether or not they call themselves Communists or Socialists), then the discussion as to how the Constitution should be interpreted will continue to be criti-

²⁴¹ See Marta Kolomayets, *Verkhovna Rada Fails to Pass Election Law, Constitutional Amendments*, UKRAINIAN WKLY., Sept. 7, 1997, at 1.

²⁴² See, e.g., *Ukraine*, E. EUR. CONST. REV., Winter 1997, at 31, 31-32.

²⁴³ See Vladimir Skachko, *Trial of a Defender of Deceived Investors*, SEVODNYA, Dec. 8, 1995, at 7, excerpted in CURRENT DIGEST OF POST-SOVIET PRESS, Jan. 3, 1996, at 25 (discussing the ordeal of Leopold Taburgansky).

²⁴⁴ See Roman Woronowycz, *Parliament Committee Acts on Kuchma Impeachment*, UKRAINIAN WKLY., Sept. 14, 1997, at 2.

²⁴⁵ See Lysyj, *supra* note 216, at 3.

²⁴⁶ See Kolomayets, *supra* note 241, at 1.

²⁴⁷ See *id.*; Lysyj, *supra* note 216; *Ukraine's Dangerous Decline*, N.Y. TIMES, Apr. 14, 1998, at A1.

²⁴⁸ See Anatoliy Tkachuk, *Noted on the Structure of Government in Ukraine in Light of the Draft Law on the Local Radas*, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1-3.

²⁴⁹ See Lysyj, *supra* note 216 (arguing that western Ukraine democrats are outnumbered by central and eastern Ukrainian voters who favor a more leftist government).

cal.²⁵⁰ If not, Constitutional interpretation may be degraded to the point of irrelevance.

C. Western Aid: Why it is Needed

The Ukraine's land area is the largest in Europe (aside from Russia which extends into Asia) and its population is the fifth largest, yet is virtually unknown throughout the world.²⁵¹ It is clearly in the strategic and economic interest of the nations of Europe and America to aid Ukraine in its democratization process.²⁵² Economic aid is necessary to help create the political stability needed for democratization.²⁵³ After seventy years of Soviet rule, Ukraine is also in dire need of political and legal aid in terms of theory and practice in a democratic society.²⁵⁴ Ukraine is also in danger from the former Soviet elites in Russia who may prefer empire to the self-determination of nations.²⁵⁵

Lawyers, legal associations, and libraries in democratic societies could be of much aid in providing information.²⁵⁶ Democratic nations can also assist Ukraine by providing continuing aid and information to Ukrainian government agencies.²⁵⁷ Lawyers and those with legal expertise in the areas of interpretation of citizens' rights provisions may also be of aid in defining legal terminology in Ukraine and, thereby, make the provisions of the Constitution more effective.²⁵⁸ Ukraine is

²⁵⁰ See Clem, *supra* note 197 (discussing the political and demographic tragedies in Ukraine's past).

²⁵¹ See MOTYL, *supra* note 16, at 1, 4.

²⁵² See *id.*

²⁵³ See TEDSTROM, *supra* note 212, at 5; Roman Szporluk, *Nation Building in Ukraine: Problems and Prospects*, in *THE SUCCESSOR STATES TO THE USSR* 173, 180 (John W. Blaney ed., 1995).

²⁵⁴ See generally Futey, *supra* note 7, at 30.

²⁵⁵ See Szporluk, *supra* note 253, at 179.

²⁵⁶ See Bohdan Peter Rekshynskyj, *Legal News by the Ukrainian Legal Foundation: The "Ukrainian Center for Human Rights" Program* (visited Sept. 18, 1997) <http://news.std.com/sabre/UFPWWW_Etc/Law/ULF/LN9502.html> (stating that foreign aid should include texts for higher education, instruction to educate judges, aiding in publication and dissemination of texts, and aiding Ukraine to comply with international legal standards).

²⁵⁷ See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, *IMPLEMENTATION OF THE HELSINKI ACCORDS: FOCUS ON SERIOUS CHALLENGES FACING UKRAINE* (1994) (discussing the applicability of the CSCE Helsinki Final Act to bolstering Ukrainian democratization).

²⁵⁸ See generally Bohdan Peter Rekshynskyj, *Legal News by the Ukrainian Legal Foundation: Counteracting Constitutional Chaos* (visited Sept. 18, 1997)

in need of immediate aid in terms of legal education and theory, hence, Western aid should not be conditioned upon its actions on other issues such as its budget deficit.²⁵⁹ The main goal of all foreign assistance should be to allow Ukraine to maintain its independence long enough to finish the development of its national identity and fulfill its democratic destiny.

If Ukraine is allowed to develop freely and continues to move toward a democratic society and a rule of law, the future of the rights of its citizens seem bright. However, Russian domination or interference will, most likely, destroy the advances Ukraine has made and drag Ukraine back into the abysmal legal vacuity of Russia's past (and potentially future) national identity.

D. The Appropriate Interpretive Method for Ukraine and its Future Use

The current Ukrainian Constitution does make great strides toward a democratic society.²⁶⁰ It provides for rights of citizens and states honest limitations which, when strictly construed, mirror the limitations on citizens rights which the U.S. Supreme Court has recognized and which may prevent the government from simply ignoring the rights of citizens as occurred in the Soviet period. To some degree clarity is also a positive point in the Constitution in that limits on citizens' rights are expressed – other factors which are not mentioned probably cannot be legitimately used to limit rights.

On the other hand, the claw back provisions which qualify the rights which are guaranteed have the potential to limit the rights they qualify to the point of ineffectiveness.²⁶¹ Furthermore, the inability to enforce economic and social rights which are guaranteed places into question the effectiveness of the entire document.²⁶² These economic and social rights are theoretically and practically unenforceable against the government.²⁶³ Moreover, these rights may be simply too expensive for the Ukrainian Government to provide in the current

<http://news.std.com/sabre/UFPWWW_Etc/Law/ULF/LN9505.html>; Rekshtynskyj, *supra* note 256 (arguing that standardization of Ukrainian legal terminology is needed).

²⁵⁹ See TEDSTROM, *supra* note 212, at 5.

²⁶⁰ See Futey, *supra* note 7, at 34.

²⁶¹ See *id.* at 30.

²⁶² See *id.*

²⁶³ See *id.*

economic climate.²⁶⁴ Furthermore, if some constitutional positive rights are not followed, it is possible that the negative restrictions on government action may be equally ignored. Further, it is obvious that the inclusion of positive rights in a manner other than goals in a preamble was unwise due to Ukraine's unique history and current economic difficulties.²⁶⁵

Ukraine faces serious challenges in enforcing the Constitution's citizens' rights provisions without letting them be swallowed up by the claw backs. If it is to succeed, Ukraine must stay independent, as "democracy and empire are incompatible."²⁶⁶ It must defeat internal tendencies to return to Soviet-style rule or simply amend the Constitution when it conflicts with an illegitimate governmental goal.²⁶⁷ It must rise above its history of assassination of her national leaders by foreign powers and Russification.²⁶⁸ Further, it must reconcile the ethnic divisions within its society²⁶⁹ and the ethnic crisis in Crimea.²⁷⁰ Finally, Ukraine's news media must break the Soviet mold of control-

²⁶⁴ See *Guidelines for the Plan of Development*, *supra* note 190, at 2-3 (describing how to estimate the cost of economic aid to citizens); Law of Ukraine on the State Budget of Ukraine for 1994 (1994) (Ukr.), translated in *Law of Ukraine on the State Budget of Ukraine for 1994*, 1994 PARLIAMENTARY DEVELOPMENT PROJECT 1; *On the State Budget of Ukraine for 1994*, *supra* note 207 (outlining the process for implementing the state budget).

²⁶⁵ See Futey, *supra* note 7, at 30.

²⁶⁶ Roman Szporluk, *Statehood and Nation Building in Post-Soviet Space*, in *THE INTERNATIONAL POLITICS OF EURASIA, VOLUME 2: NATIONAL IDENTITY AND ETHNICITY IN RUSSIA AND THE NEW STATES OF EURASIA* 3, 16 (Roman Szporluk ed., 1994).

²⁶⁷ See M. Melnyk, *About Two Important Projects Concerning the Law*, SVOBODA, Sept. 26, 1997, at 2.

²⁶⁸ See Oleksander Rudenko-Desniak, *Ukrainians in Russia*, *PERSP. CONTEMP. UKR.*, Nov.-Dec. 1995, at 1, 5, 6 (excerpting a speech delivered Nov. 16, 1994); Lepingwell, *supra* note 221, at 70, 79-81.

²⁶⁹ See Boris Sergeevich Krylov, *Concept of Federalism in Light of the Rights of Nations to Self-Determination*, in *GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R.: POWER ALLOCATIONS AMONG CENTRAL, REGIONAL, AND LOCAL GOVERNMENTS* 415, 415-16 (James E. Hickey, Jr. & Alexej Ugrinsky eds., 1996) (describing ethnographic policies in Ukraine and Russia).

²⁷⁰ See Ian Bremmer, *The Politics of Ethnicity: Russians in the New Ukraine*, 46 *EUR.-ASIA STUD.* 261, 280-81 (1994) (describing Kiev and Lviv as successfully integrating Russian minorities while Crimea has remained problematic).

ling public opinion through symbols and yellow journalism and begin to operate as an independent check on the government.²⁷¹

Ukraine must overcome these obstacles in steps, first establishing a state, then followed by rule of law, civil society, a market economy, and democracy.²⁷² Ukraine has made great strides down this path. Russia is not currently a military threat.²⁷³ Ethnic division has been combated by a "zero option" of citizenship, which gives citizenship to all those citizens of the USSR who were permanent residents of Ukraine on the date of its independence.²⁷⁴ Hence, Ukraine has chosen not to define itself as an ethnic state,²⁷⁵ which has served it well in combating ethnic infighting.²⁷⁶ Ukraine has also compiled a good record on human rights,²⁷⁷ expounding: (1) a liberal ethnic policy which is deferential to ethnic minorities;²⁷⁸ and (2) a path independent from Russia and toward the Council of Europe's norms for civil rights and environmental protection.²⁷⁹ In fact, in investigating Ukraine's application to join the Council of Europe, the recommendation for admittance was largely based on Ukraine's favorable human rights record.²⁸⁰

²⁷¹ See Natalia Kostenko et al, *Ukrainian Mass Media and Freedom of Information*, 4 POL. THOUGHT (1994) at 148, 148, 155.

²⁷² See MOTYL, *supra* note 16, at 68-70; George Schöpflin, *Postcommunism: The Problems of Democratic Construction*, DAEDALUS, Summer 1994, at 127, 131 (stating that rule of law is necessary for political and economic stability).

²⁷³ See Brian D. Taylor, *The Challenges of Ukrainian Statehood*, PERSP. CONTEMP. UKR., Mar.-Apr. 1995, at 5, 5.

²⁷⁴ See *Parliament Passes Law on Citizenship*, AMERICA, Mar. 7, 1997, at 11.

²⁷⁵ See Roman Szporluk, *Reflections on Ukraine After 1994: The Dilemmas of Nationhood*, HARRIMAN REV., Mar.-May 1994, at 1, 1.

²⁷⁶ See Ian Bremmer, *Russians in Ukraine*, PERSP. CONTEMP. UKR., Sept.-Oct. 1995, at 1, 3, 7 (arguing that Russians have generally chosen to integrate politically and ethnically and support Ukrainian political thought).

²⁷⁷ See Taras Kuzio, *The Emergence of Ukraine: Part Two*, 268 CONTEMP. REV. 182, 189 (1996).

²⁷⁸ See Susan Stewart, *Ukraine's Policy Toward its Ethnic Minorities*, RFE/RL RES. REP., Sept. 10, 1993, at 55, 55-57.

²⁷⁹ See *Ukraine Sets Course for the West*, *supra* note 64, at 26 (stating that return to the USSR is impossible as the Confederation of Independent States did not work).

²⁸⁰ See Parliamentary Assembly of the Council of Europe, *Opinion No. 190 on the Application by Ukraine for Membership of the Council of Europe*, reprinted in 16 HUM. RTS. L. J. 373, 373 (1995).

To continue down the path Ukraine has chosen, and to fully join the Western family of nations, the Constitutional Court must choose one of the interpretive models I have expounded in this Note. A failure to do so will inevitably lead to greater governmental intrusion in what the Constitution describes as protected rights.²⁸¹ Governmental control is not the answer.

²⁸¹ See generally Aivars Slucis, *Russian Imperialism Lives*, N.Y. TIMES, Oct. 25, 1997, at A11 (discussing after-effects of Russian aggression in Eastern Europe).